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DU

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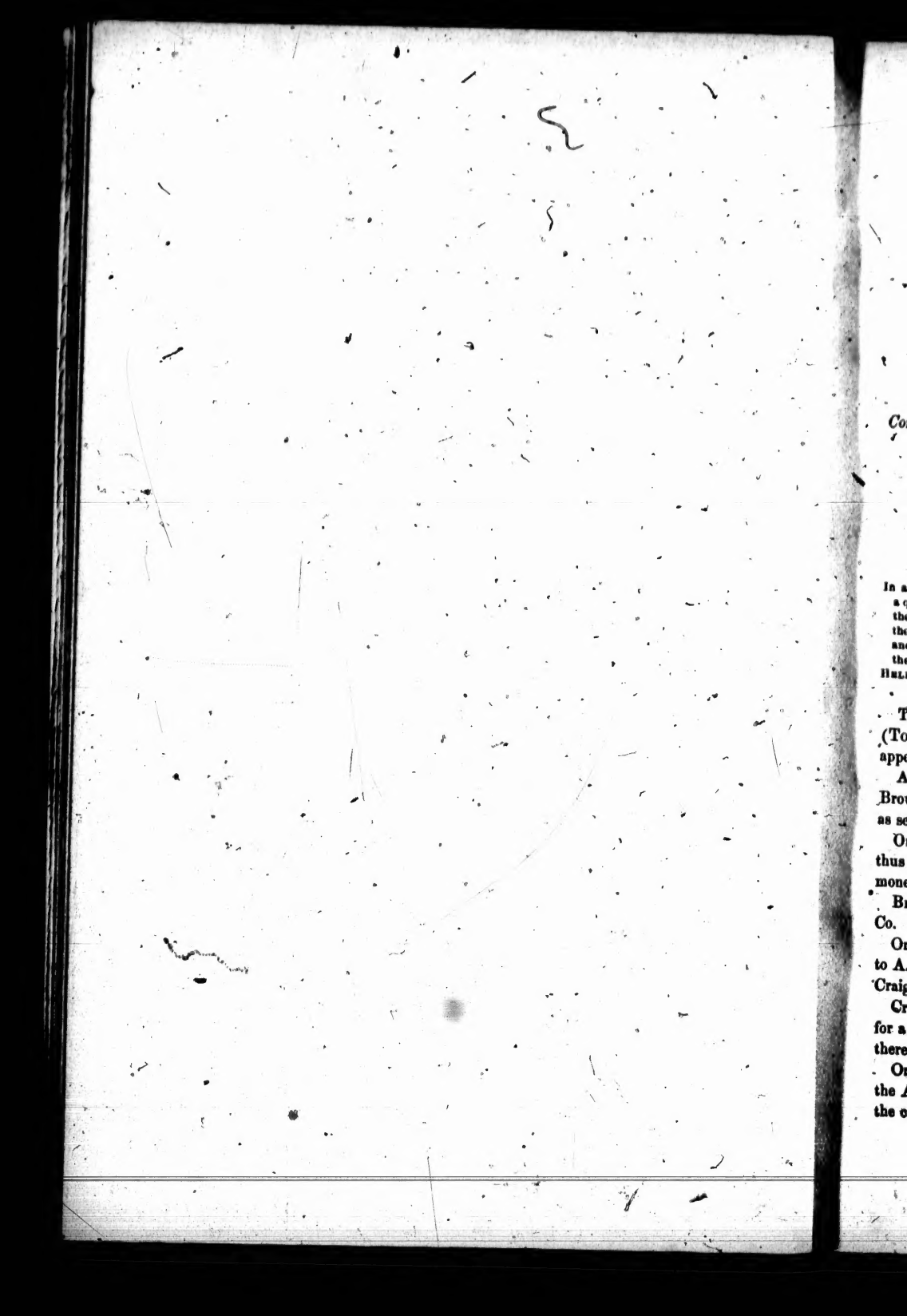
ERRATUM :—In *Parker & Felton*, vol. 21, page 256, two paragraphs have been accidentally misplaced. The paragraphs from "It is manifest," etc., to "2042," which appear at the end of the opinion of the Chief Justice, should precede that opinion, and should appear as the argument of Felton & Felton for the respondent.



THE

LOWER CANADA JURIST:

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 4TH FEBRUARY, 1879.

Coram HON. SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 118.

BORROWMAN ET AL.; APPELLANTS;

AND

ANGUS ET AL., RESPONDENTS.

In accordance with a usage of trade at Montreal, appellants borrowed from Brown, McMinn & Co. a quantity of corn, depositing a sum of money as security for its return. Two or three days before the insolvency of the latter, appellants returned the corn, but neglected to exact the re-payment to them of the money deposit. The corn was immediately afterwards sold by Brown, McMinn & Co., and the proceeds of the sale subsequently collected by the assignee of their estate appointed under the Insolvent Act of 1869.

HELD:—That the appellants had no lien or privilege on these proceeds for the amount of said unreturned money deposit.

This was an appeal from a judgment of the Superior Court at Montreal (TORRANCE, J.), rendered on the 30th of April, 1878, rejecting the claim of the appellants to be paid by privilege as hereinafter mentioned.

According to a usage of trade at Montreal, the appellants borrowed from Brown, McMinn & Co. about 25,000 bushels of corn, depositing with the latter as security for their return the sum of $17,560.88.

On or about the 21st or 22nd of July, 1874, the appellants returned the corn thus borrowed, without, however, simultaneously exacting the return of the money so deposited by them.

Brown, McMinn & Co. sold the corn thus returned to them to D. Butters & Co.

On the 24th of July, 1874, Brown, McMinn & Co. assigned under the Act to A. B. Stewart, official assignee, and on the 17th of August, 1874, David J. Craig was appointed assignee by the creditors.

Craig subsequently sued, and recovered judgment against D. Butters & Co., for a balance due on the price of the corn so sold to them, and D. Butters & Co. thereupon paid the amount of the judgment to the assignee.

On the 30th of March, 1877, the assignee prepared a dividend sheet under the Act, distributing the amount thus paid to him by D. Butters & Co. amongst the creditors; in which dividend sheet the appellants were collocated *au marc*

Borrowman et al. and Angus et al.

la livre with the other creditors of the insolvents, as on a claim not then yet fyled for $14,392.31.

Due notice of this dividend sheet was given to the creditors (including the appellants), and under the provisions of the Act all dividends collocated therein became absolutely payable, if not contested on or before the 23rd day of April, 1877.

On the 21st of April, 1877, the appellants fyled a claim against the estate, contending that they were creditors of Brown, McMinn & Co. for the amount of said unreturned deposit of $17,560.88, by which they claimed to be paid, by privilege, the whole of the monies thus distributed *au marc la livre* by said dividend sheet, on the ground that these monies were actually part of the price of the corn which they had so originally borrowed from and returned to said Brown, McMinn & Co.

No contestation of the collocations contained in said dividend sheet was ever fyled by said appellants, but they obtained an order from the Superior Court on the 1st day of June, 1877 (after notice to the assignee), by which the assignee was ordered to make a new dividend sheet, and collocate the appellants according to the conclusions of their claim.

The assignee accordingly prepared a new dividend sheet, in which he collocated the appellants by privilege for the sum of $6,399 cy.

The respondents (who are the inspectors of the estate) contested this collocation, on the ground that the said claimants had not any privilege or lien on the monies distributed by said dividend sheet, and on the further ground, that, in consequence of the failure of the appellants to contest the collocations in the said first dividend sheet, all such collocations were absolutely payable to the several parties collocated, and that, under the circumstances, the claimants could not legally have or maintain the conclusions of their said claim.

The following was the judgment of the Court:—

"The Court * * * considering the said claimants had and have not any privilege or *lien* on the moneys presently in the hands of the assignee, and partially distributed by the amended dividend sheet, prepared and fyled in this matter on the sixth July, 1877, and that they were and are only entitled to be collocated *au marc la livre* in common with the other creditors of the said insolvents in respect of their said claim; doth in consequence adjudge that said claimants had and have not any privilege or lien on said moneys so in the hands of said assignee, and that the claim of claimants, in so far as they claim to be paid said moneys by privilege, is unfounded, and doth reject the said claim and order the said collocation of $6,399 in said amended dividend sheet to be struck out, and doth condemn said claimants to pay the costs of this contestation, including all exhibits."

Kerr, Q. C., for appellants:—

This transaction between Brown, McMinn & Co. and the others cannot be looked upon as a sale, although, in some respects, it may be slightly analogous thereto. Whatever may be the consequence of the sale by Brown, McMinn & Co. to D. Butters & Co., *quoad* the property in the corn, there can be no difficulty, so far as the right of the appellants is concerned, to its money proceeds in the hands of Brown, McMinn & Co., or their assignee.

The appellants submit that the reception by Brown, McMinn & Co. of the corn in question was a fraudulent reception, in view of their impending bankruptcy: that they were well aware of the fact that they could not pay for the same; and that consequently the right of property in the corn could never vest in them until the same was paid for.

The appellants liken this case to that where a principal can follow the proceeds of his property sold by his agent, and is entitled to the same so long as it can be ascertained to be such. Russel Mer. Agency, p. 220.

If the corn had remained in the possession of Brown, McMinn & Co. till the time of the insolvency, can it be pretended that the appellants would not have been entitled to it? The principle of "Personne peut s'enrichir aux dépens d'autrui," applies in such a case as this.

It is to be remembered that the claim of the appellants is to be adjudicated upon, under the Insolvent Act of 1869, and not under that of 1875, which latter destroys the rights of the unpaid vendor after delivery to the vendees; and even supposing that this were a case of sale, the appellants maintain that they were entitled to a privilege or lien upon the proceeds of the goods found in the estate of Brown, McMinn & Co. Articles 2000 and 1998 of the Code, and Art. 2102 of the C. N.—Paul Pont, Priv. and Hyp. Nos. 149, 150.

Gilbert, Code Napoléon, Art. 2103. Supplément, Nos. 57, 64, 74, 79.

Even in a case of sale in England where the buyer purchased goods on the 1st July, they were delivered on the 4th, and a fiat in bankruptcy issued on the 8th, it was held that the plaintiff had a right to disaffirm the purchase, to revest the property in the goods, and recover their value in trover against the bankrupt.

Load v. Green, 15 M. & W. 216.

See also Benjamin on Sales (2nd ed.) pp. 342, 343.

The principle upon which the appellants it may be said are admitted to have a right to claim on the estate are the Arts. 1047, 1048, 1049, 1051.

The return of the corn was made in error, inasmuch as the appellants had a right to the return of the money they had deposited as security.

Pothier, Con. Indeb. No. 147.

5 Larombière, Art. 1376, No. 13.

The return, moreover, was induced by the fraud of the insolvents.

5 Larombière, Art. 1376, No. 14.

In this matter the appellants were entitled to a transfer of the claim of the estate Brown, McMinn & Co. against D. Butters & Co., and being so entitled, the money having been paid by D. Butters & Co. to the assignee, they have an equitable claim thereon preferable to those of the ordinary creditors.

5 Larombière, Art. 1380, No. 4.

C. C. L. C. Art. 1806.

Bethune, Q. C., for respondents:—

In the Court below the appellants contended that the transaction, such as it was, amounted virtually to a sale of the corn by the appellants to Brown, McMinn & Co., for the price of the money deposit retained by the latter, and

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they relied on Art. 2000 of our Civil Code, which accords to the vendor "a privilege on the proceeds."

Before this Court, however, they do not venture to call the transaction a sale, but say it is "slightly analogous thereto"; still, however, relying on Art. 2000 of the Code, which refers only to sales.

The "proceeds" referred to in said article No. 2000 are those arising from the sale of the thing pending proceedings in revendication, or after it has been seized by a third party. In the present instance the "proceeds" did not arise from a sale under either of these two contingencies, but are the proceeds of a sale by the insolvents to D. Butters & Co., at a time when the corn was not under seizure, either at the instance of the alleged vendors (the appellants) or of a third person.

It is quite clear, therefore, that the terms of this article (even if the transaction could be distorted into a sale) do not apply to the proceeds due on a sale of a thing not in the possession of the alleged vendees at the time their estate was placed in compulsory liquidation, but sold and delivered by them previously to that time.

Not only do the precise terms of the article cited not apply to such proceeds as those last referred to, but the well-understood rule of our law on the subject at the time the Code was enacted excluded all privilege on the proceeds of the sale of moveables not actually in the possession of the alleged vendees at the time their estate was placed in compulsory liquidation. In other words, that the privilege of the vendor does not extend to the proceeds of the sales made by the vendee, but only to such as are made *upon* him. *Vide* 2nd Bourjon, Tit. 8, p. 690, paragraph 80; 2nd Brodeau, pp. 603, 605, Nos. 2 and 4; Rolland de Villargues *vo.* Privilége de Créance, § 4, art. 5, No. 151; Brodeau sur Louet-Lettre, p. xix., No. 4; Taillefer, pp. 115, 120. As Bourjon *(loc. cit.)* says, moreover, "Le simple privilégié sur le prix est regardé *avec rigueur.*" Troplong also (1 Priv. & Hyp. No. 200 *bis*), in discussing the question whether the privilege of the vendor is applicable to the case of an exchange, gives his opinion in the negative, assigning as his reason that "*les priviléges ne doivent pas être étendus par analogie.*"

On the assumption, therefore, that the transaction in question could be assimilated to a sale, it is quite clear that no privilege exists such as the appellants claim. But the respondents submit that the case was not really one of sale, but of simple retention of a deposit of money which ought of right to have been returned to the appellants.

Under all the circumstances there would seem to be no room to doubt the entire correctness of the judgment complained of, and that that judgment should be confirmed.

RAMSAY, J. *(diss.)* The facts of this case are simple. The appellants borrowed from Brown, McMinn & Co. 25,000 bushels of corn to be returned in kind, and for security of this undertaking they deposited with Brown, McMinn & Co. $17,560.88. On the 22nd July, 1874, appellants returned the corn to Brown, McMinn & Co., but without receiving back the deposit. The identical corn was sold by Brown, McMinn & Co. to D. Butters & Co., and on the 24th

July, Brown, McMinn & Co. assigned in insolvency, a sum of $6,500 being then due on the said corn by D. Butters & Co. to Brown, McMinn & Co. Appellants claim to have this sum of $6,500 paid to them by privilege.

There is no question as to facts.

Now, the unpaid vendor has a right to one of two things: 1st, to revendicate the thing; 2nd, a right of privilege on the price. In case of insolvents either of these privileges must be exercised within fifteen days after the sale (Art. 1998).

But the right to revendicate is subject to four conditions, to which it is unnecessary to advert, as the revendication is not sought (Art. 1999). Then the first part of Art. 2000 makes provision of resale during proceedings in revendication, or when the thing is seized at the suit of a third party, the original vendor being entitled to revendicate; then he is privileged as to the price in preference to all privileged creditors. The article then goes on to say, "If the thing be in the same condition," etc., "he has a like privilege upon the proceeds, except as regards the lessor or the pledgee." That is to say, that if the vendor's right to revendicate be determined by the failure of any or all of the four conditions, save the second, he has still a privilege on the price, except as regards the rights of the lessor or pledgee. This seems rather an arbitrary distinction between the two privileges. If the vendor has a right to the proceeds, saving the rights of the lessor or pledgee, one has some difficulty in seeing why he should not revendicate subject to their rights. But legislative wisdom has so willed it. Now what is being "still in the same condition?" Is a thing sold in the same condition? If we seek inspiration from the Code, we find it implied (Art. 1993, s.s. 3) that the thing does not cease to be in the same condition by its passing into the hands of a third party, "unless he has paid for it." We are, therefore, to conclude that within the meaning of Art. 2000, the thing sold, and unpaid for, still leaves a privilege to the original vendor, so long as it can be distinguished.

But this applies to a sale of the thing—it is the privilege of the vendor; and the appellants, it is said, are not vendors. We have then to ask, are the appellants in the position of vendors? It seems to me that they are. The contract was to advance grain for a deposit of its value, which deposit was to be returned if a similar quantity of grain was returned to the holder. This transaction had, in reality, all the character of a double sale, and the return of the grain was neither more nor less than a *datio in solutum*. Now, it is a familiar saying that *datio in solutum est vendere*. And the reason is clear; the *datio in solutum* has all the essentials of a sale. There is *res, pretium, consensus*. We have all that here. I am, therefore, of opinion to reverse.

It may perhaps be said that this is the *prêt de consomption*. But this is not a unilateral contract, but really a double sale. But were it otherwise, this would be merely a subtlety disregarded by our law.

MONK, J., also thought the judgment should be reversed, and remarked that the equities were strongly in favor of the appellants, and in a case of doubt like this, weight should be given to such a consideration. The contract, if not exactly a sale, was something very much like it, and the appellants stood in the position of unpaid vendors.

Borrowman et al., (and Argue et al.

SIR A. A. DORION, Ch. J. This appeal arises out of a contestation, by the respondents, of the collocation of the appellants for a sum of $6,399, as privileged creditors of the insolvent estate of Brown, McMinn & Co.

The respondents are the inspectors of the estate.

In July, 1874, the appellants borrowed from Brown, McMinn & Co. 25,000 bushels of corn, for which they deposited with them $17,560.88, as security that they would return the same quantity of corn. About the 22nd of the same month of July, the appellants returned the corn thus borrowed, without exacting at the same time the return of the money they had deposited.

Brown, McMinn & Co. sold the corn to D. Butters & Co., to whom it was delivered.

On the 24th of July, Brown, McMinn & Co. made an assignment of their estate, under the Insolvent Act of 1869.

David J. Craig was subsequently appointed assignee to the estate, and recovered a sum exceeding $7,000, being the balance of the price of the corn returned by the appellants to Brown, McMinn & Co., and which the latter had sold to D. Butters & Co.

The assignee prepared a dividend sheet, dividing the sum received from D. Butters & Co. *au marc la livre* amongst the creditors of the insolvents, and reserving for the appellants a dividend as on a claim, not yet filed, for $14,392.31.

The delay to contest the dividend sheet so prepared was to expire on the 23rd of April, 1877, but on the 21st the appellants filed a claim for $17,560.88. By their claim they asked to be paid, by privilege, the whole sum of money distributed by the dividend sheet, on the ground that the monies so distributed formed part of the price of their corn which they had returned to Brown, McMinn & Co., and which was fraudulently sold by them to D. Butters & Co.

The appellants, immediately after fyling their claim, presented a petition to a judge, asking that the dividend sheet already prepared be set aside, and that a temporary order restraining the assignee from paying the dividend be issued.

Notice of this petition was given to the assignee, but not to the creditors collocated.

The temporary order asked for by the appellants was granted, and on the 1st of June, 1877, the dividend sheet was set aside and the assignee was ordered to prepare another one.

By this second dividend sheet the appellants were collocated by privilege for $6,399.

The respondents, as inspectors of the estate, contested this collocation: 1st. On the ground that the first dividend sheet had not been properly contested, no notice having been given to the creditors collocated, and that it had therefore become final. 2nd. Because the appellants had no privileged claim on the monies allowed to them.

The Court is not disposed to attach much importance to the first objection taken by the respondents.

Proceedings in matters of insolvency are of a summary character, and are by law placed under immediate control of the Judges of the Superior Court, to whom

a very great discretion is given to secure a prompt and just distribution of insolvents' estates.

From the nature of those proceedings the same strictness cannot be required as in ordinary proceedings before the Superior Courts. We therefore consider that, upon a representation that a prejudice would result to the appellants from the dividend sheet prepared by the assignee, it was within the discretion of the Court or Judge either to afford them relief by extending the delay for contesting it, or by setting it aside without prejudging the rights of the parties.

If the respondents had been able to show that, by the order given, they had suffered an irreparable injury, they might have claimed a revision of the order; but there has been no appeal from that order. The respondents have simply contested one item of the second dividend sheet, and they could not now avail themselves of the first dividend sheet as being still in force, while the judgment setting it aside subsists. In the absence of any substantial prejudice the Court is not disposed to interfere on a question of mere procedure.

On the merits the appellants claim their privilege as being in the position of an unpaid vendor; but are they really in that position? When they returned the corn they had borrowed they were no doubt entitled to have the sum of money which they had deposited returned to them, but this sum of money was not the price of the corn returned. By returning the same quantity of corn as that which they had borrowed they fulfilled their part of the contract, as if they had returned the identical corn received from Brown, McMinn & Co., and they were entitled to a release of the security they had given. They, however, did not sell the corn so returned. They had no claim for goods sold and delivered, but merely for money deposited, *actio depositi directa*.

Supposing, however, that the appellants could be considered in the light of unpaid vendors, the only privilege they could claim would be under article 1998, to revendicate the corn sold or to claim a preference upon its price, either of which as against an insolvent estate must be claimed within fifteen days from the date of the sale and delivery. In this instance the fifteen days would run from the 22nd of July, 1874. The appellants have only filed their claim on the 21st of April, 1877. The appellants have invoked article 2000 of the Civil Code, which gives to the vendor a privilege on the proceeds of the goods, when they have been sold pending proceedings in revendication, or after they have been seized by a third party. This necessarily supposes that the proceeds arise out of a sale on a seizure made on the purchaser while still in possession of the goods. In the present instance the proceeds to be distributed are derived from a voluntary sale made by Brown, McMinn & Co., before their insolvency, to D. Butters & Co., at a time when the corn was not seized, and before any proceedings had been taken to secure the pretended vendors the privilege they claim.

It is true that Paul Pont holds that the vendor's privilege may be exercised on the proceeds of a re-sale made by the purchaser, but this is contrary to the opinion of most other authors, and also to the jurisprudence under the French Code.

Rolland de Villargues, vo. Privilége No. 151, thus states the rule as held by all the writers before the code:

Borrowman et al., and Angus et al.

"Si le débiteur avait transmis à un autre les objets mobiliers, le privilége du vendeur serait éteint; tellement qu'il ne pourrait pas l'exercer sur l'argent qui en proviendrait."

This view of the vendor's right is borne out by the terms of article 177 of the Custom of Paris and by those of the Lower Canada Civil Code.

Troplong Priv. and Hyp., Nos. 183, 184, 184 *bis*.

The claim of the appellants appears to the majority of the Court to be for the reimbursement of monies deposited by them, and not for the price of corn sold; and, therefore, there is no privilege attached to it. If, however, the claim could be considered as being for the price of the corn returned to Brown, McMinn & Co., the appellants would have lost their privilege, for not having claimed it within fifteen days after the sale and delivery of the corn, as required by article 1998 of the Code, and also because they are not in the conditions required by article 2000.

The judgment of the Court below is therefore confirmed.

It may here be remarked that the vendor's privilege is entirely abolished by sec. 82 of the Insolvent Act of 1875. This statute does not, however, affect this case.

Judgment of Superior Court confirmed.

Kerr & Carter, for appellants.
Bethune & Bethune, for respondents.
(S.B.)

SUPERIOR COURT, 1879.

MONTREAL, 14TH NOVEMBER, 1879.

Coram JOHNSON, J.

No. 1556.

Gnaedinger et al. vs. *Bertrand.*

HELD:—1. Where the order for the goods which formed the consideration of the notes sued on, was obtained in another district by the travelling agent of a Montreal firm, subject to the approval of his principals, and the order was accepted by the firm in Montreal, and the goods were delivered at the railway station there to the purchaser, who paid the freight that the right of action originated in Montreal.

2. The signing and transmission of a note with place of date in blank is equivalent to an authorization from the sender to the recipient to fill it up for him.

JOHNSON, J.—This is a plea to the jurisdiction of the Court—an exception *déclinatoire* by defendant.

He says that his domicile is at *Isle Verte*, in the District of Kamouraska, and that the cause of action arose there; that the notes on which the action was brought were signed there, and the merchandize which was the consideration of them was delivered there. There is evidence of record, and also an admission, from which it would appear that the goods were bargained for at *Isle Verte*, between the defendant and the plaintiff's traveller, the order to be subject to the plaintiffs' approval. They were delivered here—the delivery at the railway,

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and on the steamboat, being a delivery to the defendant, who paid the freight. Then, as to the notes: they bear date at Montreal; but the fact is, they were sent to the defendant in blank, and he signed them and sent them with the blank to be filled up.

This being the state of the facts, all the argument and authority offered by the defendant appear to me to have been thrown away. It is not a case where the cause of action can be said to have originated in Kamouraska. The debt was incurred in Montreal for merchandize which was delivered there. The notes are the evidence of the debt, and they are also made payable here (at the Molsons Bank). As to the place named in the note as the place of date, if the defendant chooses to sign notes with blanks for other people to fill up, that has always been held as a power of attorney from the sender to the recipient to fill it up for him. There can be no doubt, from the decided cases, that we have jurisdiction, and that upon these facts the declinatory plea must be dismissed, and it is dismissed with costs.

Macmaster, Hall & Greenshields, for plaintiff.

D'Amour & Dumas, for defendant.

(J.K.)

COUR SUPERIEURE, 1879.

MONTREAL, 13 DECEMBRE 1879.

Coram PAPINEAU, J.

No. 1952.

Gault et al. vs. *Bertrand.*

Les effets et marchandises dont le prix est réclamé en cette cause par les demandeurs, marchands à Montréal, furent vendus au défendeur, sur échantillons, à l'Ile-Verte, dans le district de Kamouraska, par le commis-voyageur des demandeurs; il est prouvé que cette vente était sujette à l'approbation des demandeurs et qu'elle fut effectivement approuvée par eux, et les effets ainsi vendus expédiés au défendeur, à l'Ile-Verte. *

JUGE:—Qu'en ce cas, le droit d'action des demandeurs n'a pas pris naissance à Montréal, mais à l'Ile-Verte, dans le district de Kamouraska, et que la présente action aurait dû être instituée dans ce dernier district.

PER CURIAM.—L'action des demandeurs est en la forme ordinaire *d'assumpsit*, pour marchandises qu'ils allèguent avoir vendues et livrées au défendeur, à Montréal.

L'exploit d'assignation a été signifié au défendeur, à son domicile, à l'Ile Verte dans le district de Kamouraska. Il a fait une *exception déclinatoire* par laquelle il allègue que le droit d'action des demandeurs, si toutefois ils en ont aucun contre lui, a pris naissance à l'Ile-Verte où la dette a été par lui contractée et où la vente et la livraison des effets dont il s'agit, ont été effectuées; qu'il n'est pas justiciable de cette Cour mais de la Cour siégeant dans le district de Kamouraska.

* La ratification de cette vente par les commettants a-t-elle eu un effet rétroactif? Les auteurs dont les noms suivent répondent unanimement dans l'affirmative:
Rolland de Villargues, t. 7, Vo. Ratification, parag. 4, col. 2, Nos. 82 and 83.
Guyot, Répertoire, t. 14, Vo. Ratification, col. 2, p. 455.
Toullier, t. 8, No. 491 et No. 514, p. 716.
C. Nap. art. 1338.
Demolombe, t. 29, pp. 626, 669 et 670.
Larombière, t. 4, Commentaire sur l'art. 1338 du C. Nap., p. 591 et seq.
Ferrière, Dictionnaire de Droit, Vo. Ratification, col. 2, 2e. al. p. 499. (Note du rapporteur).

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Les demandeurs ont répondu qu'un ordre, il est vrai, a été reçu du défendeur, à l'Ile-Verte, par leur commis-voyageur, pour les marchandises en question, mais que cet ordre devait être et qu'il a été de fait transmis à Montréal où il a été accepté et rempli, et où les marchandises dont ils réclament le prix ont été livrées à des voituriers publics pour être transportées chez le défendeur, aux frais et risques de ce dernier et des dits voituriers; et qu'ainsi le droit d'action en cette cause a pris naissance à Montréal où le défendeur a été valablement assigné.

Les faits de la cause sont peu nombreux et clairement prouvés.

Les demandeurs, par leur commis-voyageur, Deschamps, autorisé à faire des ventes pour eux, prennent l'ordre du défendeur, chez ce dernier, dans le district de Kamouraska. Cet ordre, écrit par le commis des demandeurs, mentionne et indique la dénomination, la quantité et le prix des marchandises en question; le terme de paiement et le mode de leur transmission au défendeur, qui, effectivement, a reçu ces marchandises.

Trois choses sont de l'essence de la vente: l'objet vendu, le prix de vente et le consentement des parties.

Dans l'espèce actuelle, le concours de toutes ces conditions, requises pour la perfection de la vente, a eu lieu à l'Ile-Verte, au domicile même du défendeur.

Il est vrai que Deschamps n'était que l'agent autorisé des demandeurs, et qu'il dit que la vente ne devait être complétée que par l'acceptation définitive de ses commettants à Montréal et par l'envoi des marchandises.

Les demandeurs ont ratifié la vente ainsi faite par leur agent au défendeur et lui ont expédié les marchandises en question. Leur ratification a un effet rétroactif au moment de la vente. Cette ratification à Montréal, sans condition nouvelle ni différente, a exactement le même effet que si les demandeurs eussent été à la place de leur commis chez le défendeur. L'expédition et la livraison des marchandises ne contribuent en rien à la perfection du contrat: elles ne sont que l'exécution de celui-ci, de la part des demandeurs. Si les demandeurs avaient négligé de les livrer, le défendeur, en offrant le prix convenu, aurait pu former contre eux l'action *ex empto* pour les contraindre à la livraison, et à défaut de livraison, à payer les dommages-intérêts lui résultant de ce défaut. Donc le lien de droit existait avant la livraison.

De même, les demandeurs ont contre le défendeur, l'action *ex vendito* pour se faire payer le prix de vente. Mais comme le contrat de vente est synallagmatique, leur droit d'action quoique *né au moment du contrat*, n'est ouvert que par la livraison, lorsqu'il n'y a pas de terme stipulé pour l'effectuer.

La vente dépendant entièrement du consentement des parties sur la chose qui en est l'objet et son prix, l'action qui en résulte *nait de ce consentement qui produit le lien de droit entre les parties.*

Le défendeur, ayant donné son consentement à la vente et ce consentement ayant été accepté à l'Ile-Verte, dans le district de Kamouraska, s'est lié dans ce district, et le droit d'action produit par ce lien a pris naissance dans ce district et non à Montréal: c'est donc dans le district de Kamouraska et non à Montréal, que ce droit d'action doit être exercé.

Le défendeur dans une lettre produite en cette cause, paraît s'exprimer comme

si le lieu du paiement était à Montréal ; les demandeurs ont delà prétendu que le lieu du paiement doit être considéré comme celui du contrat.

Nous voyons dans plusieurs auteurs anciens et remarquables, qui ont traité la question de la juridiction et de la compétence des tribunaux, que le lieu du contrat et celui où doit se faire le paiement, sont considérés comme autant de lieux où le débiteur peut être poursuivi ; et même que le lieu choisi pour y faire le paiement, est considéré comme étant celui du contrat, quoique le contrat ait été passé ailleurs.

Colerus, cité par Boullenois, partie seconde, chap. 1er., nos. 77, 78 et suivants, dit : "*qui solutionem pecuniæ destinat ad certum locum is expresse se* "*obligat quod ibi velit exigi..... forum destinatæ solutionis causatur ab ex-* "*pressâ consensu partium.....quæ omnia procedunt quantum ad competen-* "*tiam fori in quo reus pro faciendâ solutione pulsari, vel exigi valeat.*" Et Brunemann, (Cod. ubi conveniatur, L. uni.) "*in contractibus forum speciale est* "*locus contractus, qui duplex est, in quem destinata solutio vel in quo contrac-* "*tum est, nam locus destinatæ solutionis videtur esse ipse locus in quo dicitur* "*contractum. Nam locus contractus intelligitur, ubi quid dari promissum est,* "*seu in quo, ut quis solveret, se obligarit licet alibi contractus fuerit celebra-* "*tus.*"

Mais Boullenois, Traité de la personnalité et de la réalité des lois, t. 2, p. 607, dit sur cette question : "Je sais bien que parmi nous, nous n'admettons pas pour "règle ordinaire tous ces différents endroits comme lieux de juridiction. Il faut "se pourvoir au domicile de celui que l'on assigne et l'assigner en action person-"nelle devant son juge : le titre du ff: *de eo quod certo loc :* et celui du Cod. "*ubi conveniatur*, ne sont pas non plus observés en France, pour déterminer les "juridictions." Il cite Imbert et Bacquet, puis ajoute : "et cela ne fait pas de "difficulté en matière personnelle, qui est précisément le cas que nous agitons."

Boullenois fait une exception pour le cas où le débiteur comparaissant se soumet volontairement à la juridiction, et continue en disant : "Les marchands "néanmoins, suivant l'ordonnance du commerce de 1673, tit. 12, art. 17, ont, "pour raison de leurs affaires de commerce, le choix, soit du domicile, soit du "lieu où la promesse a été faite et la marchandise fournie, soit du lieu auquel "le paiement doit être fait et cela pour la plus prompte expédition des affaires "du commerce : ce qui intéresse toutes les nations."

Bacquet, Traité des droits de justice, t. 1er, chap. 8, pp. 27 et 28, à l'endroit cité par Boullenois, dit :—"Nous tenons en France que les Sceaux Royaux ne "sont point attributifs de juridiction, sinon le Séel du Châtelet de Paris..... "Tellement que le créancier, nonobstant la soumission générale ou spéciale, est "tenu de faire poursuite de sa dette par devant le juge, *en la justice duquel le* "*débiteur est demeurant.* CAR EN FRANCE, EN ACTION PERSONNELLE, LE "DEMANDEUR EST TENU SUIVRE LE DOMICILE DU DEFENDEUR, et le pour-"suivre pardevant son juge naturel et *domiciliaire*, sans avoir égard au lieu "auquel l'obligation a été passée et à la soumission générale ou spéciale portée "par icelle."

Pigeau, Procédure civile, t. 1er p. 93, dit : "Il faut suivre le domicile du "défendeur, c'est-à-dire l'assigner devant les juges de la juridiction dans "l'étendue de laquelle il demeure ; ce que l'on exprime en droit, par cet

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"axiôme vulgaire: *Actor sequitur forum rei*.....Il y a deux genres d'excep-"tions à cette règle générale: le premier est de celles qui proviennent de la "personne qui fait assigner; le second regarde celles qui ont leur source dans la "nature de l'affaire même."

Le premier de ces genres d'exceptions est composé de trois exceptions et le second, de cinq.

Parmi les trois exceptions du premier genre et les cinq exceptions du second genre, signalées par Pigeau, nous ne retrouvons pas le lieu du contrat ni celui du paiement, comme attributifs de juridiction.

Pothier, Procédure Civile t. 7, p. 18, parg. 2, 2me al., dit: "Il y a incom-"pétence, *ratione personæ*, lorsque la personne n'est pas justiciable du juge "devant qui elle est assignée, *putà*, parce qu'elle demeure hors l'étendue du "territoire de ce juge."

"Nous appelons *territoire du juge*, le territoire dans lequel il y a une "juridiction de première instance."

Après avoir donné la règle générale, Pothier, comme Pigeau, fait connaître les cas d'exceptions, sans mentionner le lieu du contrat ni celui du paiement.

L'ordonnance de 1667, enregistrée au Conseil Supérieur de Québec, n'a rien changé à la juridiction des tribunaux sous ce rapport, et nous arrivons à la conquête du pays par l'Angleterre, avec la jurisprudence telle que rapportée par Bacquet et Boullenois.

La 25me George III, chap. II, intitulée Ordonnance pour régler les formes de procéder dans les causes civiles de judicature, etc., en la Province de Québec, dans sa section première, porte que: "dans tous procès et affaires de propriété "excédant la valeur de dix livres sterling, il sera présenté à aucun des juges "des cours des plaidoyers communs, par tous particuliers, une déclaration "contenant les motifs de sa plainte contre un défendeur, dans laquelle il "sollicitera un ordre pour le contraindre à comparaître et y répondre; tel juge "(sera tenu) et il lui est enjoint d'accorder *dans son district*, un ordre.....de "sommation.....qui sera adressé au shérif du district où telle Cour aura "juridiction, ET DANS LEQUEL LE DEFENDEUR POURRA ETRE OU SERA "RESIDANT."

La 4mè et 5me Vic. chap. 20, (1841) établissant les Cours de Districts Inférieurs, pour les causes de $25 à £20 sterling, par la sec. 13me donne juridiction à cette Cour de district, sur tous les défendeurs dans une cause, pourvu que l'un d'eux soit domicilié ou ait reçu personnellement assignation dans tel district.

La 7me Vic. chap. 16 (1843) pourvoyant à une meilleure administration de la justice et créant des Cours de Circuit, contient la même disposition dans la section 32me.

Nous arrivons enfin à la 12me Vic. chap. 38, créant, en 1849, la Cour Supérieure actuelle et attribuant à cette Cour et à la Cour de Circuit, leur juridiction respective, et nous y voyons la disposition suivante, contenue dans la 14me section pour la Cour Supérieure, et répétée dans la 49me section, pour la Cour de Circuit:—"Toutes actions, poursuites ou procédures pourront être "commencées à l'endroit où se tiendront les termes de la dite Cour dans aucun "district; *pourvu que la cause de telle action*, poursuite ou procédure respecti-

" vement *soit né* dans ici district, ou que le défendeur, ou l'un des défendeurs, " ou la partie ou l'une des parties à laquelle l'original du bref, ordre ou autre " pièce de procédure est adressé, soit domicilié ou ait reçu personnellement " signification du dit bref, ordré ou autre pièce de procédure, dans le dit district, " et pourvu que tous les défendeurs ou parties susdites aient légalement reçu " signification de la pièce de procédure et *non autrement*, excepté dans les cas " où certains des dits défendeurs ou parties sont assignées par avertissement " ainsi que le prescrit la loi."

Cette disposition est reproduite textuellement dans la sec. 26e. du chap. 82 des Statuts Refondus du Bas-Canada et est virtuellement contenue dans l'art. 34 C. P. C.

Voici quelques décisions rendues sous l'empire de cet article ; elles sont rapportées dans nos annales judiciaires, moins toutefois la cause de Gnaedinger vs. Vaillancourt.

1 Rap. J. de Q. p. 61, Wurtele *vs.* Lenghan et al.

13 L. C. J., p. 60, Gault et al. *vs.* Wright et al.

21 ibid. p. 114, Mulholland et al. *vs.* La compagnie de fonderie de A. Chagnon et al.

Contra : 17 L. C. J. p. 241, Lapierre *vs.* Gauvreau.

Gnaedinger *vs.* Vaillancourt, C. S. Montréal, No. 1879, jugement rendu par la majorité de la Cour de Révision, composée de Mackay et Rainville, JJ., et Papineau, J. *dissentiente.*

L'article 17 du titre 12 de l'Ordonnance du commerce de 1673, qui n'a pas été enregistrée au Conseil Supérieur de Québec, lequel se trouve reproduit dans l'article 420 du Code de procédure civile français, n'a jamais été en force dans la Province de Québec ; et les juges ne sauraient être trop sur leur garde, lorsqu'on leur cite comme autorités sûr le point en question, les auteurs français qui ont écrit sous l'empire du droit spécial introduit par cette Ordonnance, en faveur des commerçants. Car cet article 420 du Code français n'a rapport qu'aux ajournements devant les tribunaux de commerce ; tandis que l'article 59 du même Code, règle les ajournements devant les tribunaux civils.

Ici, toutes les actions civiles et commerciales sont portées devant un même tribunal, dont la juridiction est réglée par les articles 34 et suivants du C.P.C., jusqu'au 42e article inclusivement ; et par l'article 68 du même Code, pour ceux qui n'ont jamais eu ou qui n'ont plus de domicile dans un district de la Province de Québec, mais qui y ont des biens.

Maintenant, supposons un instant avec les demandeurs, qu'ils n'aient accepté l'ordre du défendeur qu'à Montréal et que la convention de la vente en question, n'ait été terminée qu'à Montréal, pouvaient-ils instituer la présente action dans le district de Montréal ?

Nous ne le pensons pas et voici pourquoi :—La convention ne tire sa valeur que du consentement et de la volonté des parties ; il n'y a pas de lien dans un contrat à moins que les parties ne consentent à se lier ; or, il est bien constant que dans le cas actuel, le défendeur n'a pas donné son consentement ailleurs que dans le district de Kamouraska ; et si les demandeurs n'ont donné le leur qu'à Montréal, le droit d'action réciproque des parties n'aurait pris naissance parfaitement et *entièrement* ni dans un district ni dans l'autre, mais partiellement dans

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les deux, et alors ni l'une ni l'autre des parties ne pourrait réclamer le privilège d'assigner son adversaire devant le tribunal de son propre district. Il faudrait en ce cas recourir au tribunal du domicile de celui que l'on voudrait poursuivre, suivant la règle générale *actor sequitur forum rei*.

6 L. C. R. p. 492, Warren *vs.* Kay et al.
12 ibid. p. 416, Jackson et al. *vs.* Coxworthy.
6 L. C. J. p. 46, Sénécal *vs.* Chênevert.
13 ibid., p. 60, Gault et al. *vs.* Wright et al.
1 Rap. J. de Q. p. 204, Connolly *vs.* Brannen.

A cette série de décisions presque uniformes, nous ajouterons encore le jugement de la Cour d'Appel, en date du 4 février dernier, dans la cause de *The National Insurance Co.* et *Paige*, rapporté au 2e. vol. du Legal News, p. 93, col. 2, dans laquelle cause l'Hon. Juge en Chef Sir A. A. Dorion, fit les remarques suivantes :

" The appellants say that the stock was allotted by the directors here in Montreal.
" We think *the whole cause of action* did not arise here : part of the cause was
" the promise to pay in the district of St. Francis."……

Pour toutes ces raisons, l'*exception déclinatoire* du défendeur est maintenue et l'action des demandeurs renvoyée avec dépens, *sauf à se pourvoir*.

Voici le texte même de ce jugement :

" La Cour, etc.—Considérant qu'il est prouvé que l'ordre produit par les demandeurs, comme leur exhibit A, pour les marchandises dont ils réclament le prix par leur action, a été pris par le commis des demandeurs, chez le défendeur, à l'Ile-Verte, dans le district de Kamouraska, et que le dit ordre écrit et signé par le dit commis, contient la quantité, le prix et le nom des marchandises requises et achetées par le défendeur, avec le terme de paiement ainsi que l'indication de la voie par laquelle ces marchandises devaient être expédiées jusqu'à Québec au soin du nommé G. Tanguay, pour le défendeur ;

" Considérant que cet écrit et la convention dont il a été le résultat, contiennent les trois choses essentielles à une vente, savoir : le consentement des demandeurs, vendeurs, par leur commis préposé aux ventes (salesman) ; le consentement de l'acheteur, le défendeur, sur des marchandises déterminées quant à la qualité et à la quantité, et sur le prix de ces marchandises ; et que cette vente se trouvait parfaite à l'Ile-Verte, dans le district de Kamouraska ;

" Considérant que dans l'hypothèse même où la dite vente n'aurait été complétée que par l'acceptation subséquente des demandeurs et la livraison des marchandises à Montréal, le droit d'action contre le défendeur, résultant pour les demandeurs, de la dite vente, n'aurait pas entièrement pris naissance à Montréal, vu qu'un des éléments essentiels au dit contrat, le consentement du dit défendeur, aurait été obtenu hors du district de Montréal ;

" Considérant d'ailleurs, que la dite vente, faite à l'Ile-Verte, par le commis autorisé des demandeurs, doit être considérée comme faite par eux-mêmes, et qu'en [illegible] subséquemment à Montréal, comme il est prouvé qu'ils l'ont fait, [illegible] ont nécessairement donné un effet remontant à l'instant où elle [illegible] à l'Ile-Verte ;

" Considérant que bien que la vente des choses à la mesure, ne soit absolument parfaite, en un sens, que par le mesurage, cependant telle vente est, dans un autre sens, si parfaite qu'elle produit un lien de droit entre les parties, et qu'-

aux termes de l'article 1474 de notre Code, l'acheteur a une action contre son vendeur, pour se faire mesurer et livrer l'objet de la vente ou se faire payer des dommages; et que, de son côté, le vendeur a son action contre l'acheteur, pour forcer ce dernier à accepter le mesurage et recevoir la délivrance ou à payer les dommages résultant de son refus; Daunt et al., vs. Bertrand.

"Considérant que le défendeur n'était pas domicilié dans le district de Montréal, lors de la signification de l'exploit d'assignation, et que telle signification lui a pas été faite personnellement dans ce district, mais dans celui de Kamouraska, lorsqu'il n'est pas justiciable de ce tribunal, pour les causes mentionnées dans la demande;

"Considérant que les mots "le droit d'action," dans le troisième paragraphe de l'article 34 du Code de Procédure Civile, ne constituent pas une innovation au droit, mais ne fait qu'exprimer en d'autres termes l'idée rendue par les mots "la cause d'action," dans la vingt-sixième section du chapitre 82 des Statuts Refondus du Bas-Canada, et que pour donner juridiction à cette Cour sur le défendeur, il faudrait que le lieu de droit eût été complètement formé dans ce district; ce qui n'est pas;

"Considérant que le défendeur a prouvé les faits nécessaires au maintien de son exception déclinatoire, la Cour la maintient avec dépens contre les demandeurs, distraits à Maîtres D'Amour et Dumas, avocats du défendeur, et renvoie les dits demandeurs à se pourvoir au principal devant le tribunal compétent."

Exception déclinatoire maintenue.

Davidson & Cushing, procureurs des demandeurs.

D'Amour & Dumas, procureurs du défendeur.

(J.G.D.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 14TH JUNE, 1879.

Coram HON. SIR A. A. DORION, Ch. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 169.

BEATTIE, APPELLANT;

AND

WORKMAN, RESPONDENT.

HELD:—That a letter of guarantee by an agent of a tanner, to the effect that, in consideration of the party to whom the letter is addressed endorsing a note for $2,000 in favor of the tanner, he will retain in his hands the surplus funds, to the extent of $2,000, arising from the sales of sole leather, then coming in for sale and in process of manufacture, is binding on such agent personally, without special acceptance, and is also so binding notwithstanding that the note so endorsed should be for $2,300 instead of $2,000.

SIR A. A. DORION, CH. J.:—This appeal arises out of a judgment rendered in favor of the respondent against the appellant, on a letter of guarantee in the terms following:—

Beattie and Workman.

"Montreal, December 23rd, 1872.

"THOS. WORKMAN, ESQ.,

"Montreal.

"Dear Sir,

"In consideration of your endorsing for Mr. John Hale of New "Glasgow a note for two thousand dollars, at three months date, I agree (after "having paid the 'Molsons Bank' the amount of their claim and my commis- "sion, &c.) to hold any surplus there may be, to the extent of two thousand "dollars, for your account, against the above note, out of the sale of the sole "leather now coming in for sale and in process of manufacture.

"Yours truly,

(Signed) "D. P. BEATTIE."

This letter was taken to the respondent who, at Hale's request, endorsed a note for $2,200, instead of one for $2,000, as mentioned in the letter of guarantee.

The appellant admitted that, on the same day that the respondent endorsed the note for Hale, he was informed of it; and Hale states in his evidence that the note produced is the one which was endorsed in consequence of the letter of guarantee given by the appellant.

When the note matured the respondent had to pay it, and he has brought this action, by which he prays that the appellant be ordered to render an account of the sole leather he has received from Hale and of the proceeds of the sale, and that he be condemned to pay to the respondent out of the proceeds of such leather, which would appear to be in his hands, a sum not exceeding $2,000 and interest from service of protest, and costs of suit.

The appellant filed a *défense en fait*.

On the 18th of May, 1876, the Superior Court condemned him to render an account as demanded by the declaration.

The account was rendered, and, on a contestation by the respondent, the Court set it aside and ordered another account to be rendered as required by the previous judgment.

The appellant complains of this judgment and of that of the 18th of May, 1876.

The grounds urged for the dismissal of the action are: 1st. that the letter of guarantee contained a mere offer of guarantee which required a formal acceptance and notification of it to give it a binding effect. 2nd. That the request contained in the letter of guarantee was that the respondent should do a specific act, that is, endorse a note for $2,000, and that this was not complied with, by doing another act, that is, by endorsing a note for $2,200.

Many authorities have been cited in support of these abstract propositions. They are, however, not applicable to the special circumstances of this case.

The first objection of the appellant is met by the evidence adduced, that on the very day the note was endorsed the appellant was informed of it and never remonstrated with the respondent for having endorsed a note for $2,200 instead of one for $2,000.

Beattie and Workman.

As to the second objection the appellant is not in the position of one who signs a letter of guarantee without consideration. He was the agent of Hale from whom he received large quantities of leather. At the request of Hale, his principal, he agrees to retain in his hands, after the claim of the Molsons Bank is paid, a sufficient sum, not exceeding $2,000, to guarantee the respondent against the liability he is requested to assume by endorsing Hale's note. What interest can the appellant have to contest the amount of Hale's indebtedness to the respondent; he is only required to pay what he was requested by Hale to retain and what he promised the appellant he would do.

The appellant is not called upon to pay anything out of his own funds as a guarantor for Hale. He is merely required to fulfil the obligation he has contracted towards the respondent to pay him out of certain monies he would receive for Hale.

This letter of guarantee is more in the nature of an accepted draft to be paid out of certain funds whenever such funds shall be received, than an ordinary letter of guarantee by which the guarantor promises to pay the debt of another.

We believe that the two judgments which have ordered the appellant to render an account of the proceeds of the leather he received from Hale are justified by the circumstances of the case, and that no injustice has been done to the appellant.

MONK, J., dissented, on the ground that he considered an acceptance by the respondent was necessary, and that, inasmuch as the note endorsed was in excess of the amount stated in the letter of guarantee, the guarantee was worthless.

The other judges concurred in the opinion expressed by the Chief Justice.

Judgment of S. C. confirmed.

Kerr & Carter, for appellant.

Abbott & Co., for respondent.

(S. B.)

COURT OF QUEEN'S BENCH, 1878.

MONTREAL, 21ST DECEMBER, 1878.

Coram SIR A. A. DORION, Ch. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 114.

DOUTNEY, APPELLANT;

AND

BRUYÈRE ET AL., RESPONDENTS.

HELD:—That the value of a deficiency of quantity in land sold is properly recoverable in the shape of damages, and that the diminution of price allowed in such a case by article 1601 of the Civil Code is only a mode of assessing such damages.

This was an appeal from the judgment of the Superior Court at Montreal, reported in 21st L. C. J., p. 95.

SIR A. A. DORION, Ch. J.:—La Cour Inférieure a jugé que l'appelant, qui se plaint d'un défaut de contenance dans les terrains que lui ont vendus les in-

Doutney and Bruyere et al.

timés, et de ce qu'il est en outre privé d'un droit de passage et de mitoyenneté compris dans la vente, devait, d'après l'article 1501 du Code Civil, conclure à une diminution de prix de vente, et son action a été renvoyée, parce qu'il avait conclu à des dommages.

Nous croyons ce jugement mal fondé. Il est bien vrai qu'en vertu de l'article 1501 celui à qui l'on a vendu un immeuble peut reclamer une diminution de prix, lorsque le vendeur ne lui livre pas toute la contenance indiquée ; mais cette diminution de prix n'est, après tout, que le mode d'après lequel la loi détermine les dommages dont l'acquéreur doit être indemnisé lorsqu'on ne lui livre pas tout ce qu'on lui a vendu. Si l'acquéreur au lieu de demander une diminution de prix, demande des dommages, la Cour devra fixer ces dommages d'après la valeur de la quantité de terrain qui ne lui aura pas été livré, et le résultat sera le même que s'il avait conclu à une diminution de prix.

Pothier au No. 259 de son contrat de vente, dit : "Lorsque la chose vendue " n'est pas de la qualité exprimée par le contrat ; comme, par exemple, s'il est " dit 'qu'un bois est agé de dix feuilles' et qu'il soit moins agé, il est du à " l'acheteur des dommages et intérêts *qui consistent dans une diminution de* " *prix.*"

L'on voit que dans cette espèce, Pothier traite la diminution de prix, à laquelle l'acquéreur a droit, comme donnant lieu à une reclamation pour dommages. Nous ne voyons aucune différence entre l'action de l'appelant et celle dont parle Pothier. Il y a ici une raison additionnelle qui devait induire l'appelant à porter son action, comme il l'a fait, c'est qu'outre le défaut de contenance, il se plaint encore de la privation de certains avantages, comme d'un droit de passage et d'un mur mitoyen. Ceci fait tomber l'action sous l'article 1518 et dans la catégorie de celle indiquée par Pothier dans le passage rapporté plus haut.

Si le jugement de la Cour Inférieure était maintenu, il s'en suivrait que l'appelant pourrait porter deux actions, l'une en diminution de prix pour défaut de contenance, et l'autre en dommages pour privation de partie des avantages de la chose vendue. Il n'est pas dans l'esprit de notre droit de multiplier ainsi les actions, lorsqu'une seule peut suffire pour faire rendre justice aux parties.

Le jugement est motivé de manière à faire connaître les faits et les questions de droit sur lesquelles cette Cour a été appelée à se prononcer.

The following was the written judgment of the Court :

" La Cour * * * considérant que les intimés en cette cause ont par acte du huitième jour d'octobre 1874, passé devant Maître Jobin, notaire, vendu à l'appelant les deux lots de terre numéro cinq et six de la subdivision du lot désigné sous le numéro 780 des plan et livre de renvoi officiels du quartier St. Louis dans la cité de Montréal, contenant le numéro cinq 2073 pieds, et le numéro six 1945 pieds, formant en tout 4018 pieds, en superficie ;

" Et considérant que par le même acte les intimés ont de plus vendu à l'appelant un droit de passage dans un passage de quatorze pieds de largeur en arrière des dits lots numéros cinq et six, et dans un autre passage ayant douze pieds dans sa plus petite largeur, et conduisant au passage ci-haut mentionné à la rue Fortier qui forme le front des deux lots vendus ;

" Et considérant que par un autre acte de vente du vingt-sixième jour d'octobre 1874, passé devant dit maître Jobin, notaire, les intimés ont vendu à l'appelant un droit de mitoyenneté dans le pignon nord-est d'une maison en briques, à trois étages avec toit plat appartenant à Theodore Hart, écuier, erigée sur l'un de ses terrains, portant le numéro 779 au plan et livre de renvoi officiels du Quartier St. Louis, avec la moitié indivise du terrain sur lequel ce pignon est construit, ce pignon s'étendant à trente pieds anglais à partir de l'alignement de la rue Fortier, de plus le droit de libre passage dans une ruelle de seize pieds anglais de largeur en arrière de la propriété Hart, depuis le terrain de la succession Burpie représentée par l'appelant jusqu'à la rue St. Dominique, le passage devant être en commun entre et avec toute personne y ayant droit, et enfin tous les droits que les intimés pouvaient avoir dans le passage entre les terrains du dit Sieur Hart et du dit appelant, dans lequel passage le dit appelant et le propriétaire du lot un de la subdivision du lot numéro 780 des dits plan et livre de renvoi officiels du dit Quartier St. Louis avaient le droit de passer, laquelle vente a été faite pour le prix de $30 ;

" Et considérant que par acte devant maître J. H. Jobin, notaire, en date du vingt-troisième jour de mai 1875, le nommé Joseph Chrétien, de la cité de Montréal, a vendu à l'appelant un droit de passage en commun avec ceux ayant droit dans les ruelles ci-dessus méntionnées et ce pour le prix de $25, lesquels droits de passage dans les dites ruelles le dit Joseph Chrétien avait achetés des dits intimés par acte de vente reçu devant maître Jobin, notaire, le dousième jour d'octobre 1874 ;

" Et considérant que les intimés ont livré à l'appelant les deux lots numéros 5 et 6 ci-haut mentionnés, mais qu'à raison d'erreurs dans les plans il se trouve un deficit dans l'étendue des terrains des intimés, en sorte qu'il leur a été impossible de livrer à l'appelant toute la contenance que ces lots devaient avoir d'après l'étendue indiquée dans l'acte de vente du huitième jour d'octobre 1874, et que pour les mêmes raisons ils n'ont pu lui fournir ainsi qu'au dit Joseph Chrétien le droit de passage dans les trois ruelles ci-haut mentionnées qu'ils leur ont vendu par les dits actes de vente ;

" Et considérant que ces ventes ayant été faites avec garantie, les intimés sont tenus d'indemniser le dit appelant des dommages qu'il éprouve par le défaut de contenance des terrains qui lui ont été vendus, et de ce qu'il est privé des droits de passage que les intimés lui ont vendus ainsi qu'au dit Joseph Chrétien qu'il représente dans les trois ruelles ci-haut mentionnées ;

" Et considérant que l'appelant n'ayant pas demandé la resiliation des dits actes de vente, l'indemnité qu'il a le droit de reclamer ne consiste d'après l'article 1501 du Code Civil, que dans une diminution du prix de vente basée sur la valeur de la partie du terrain et des droits de passage que les intimés n'ont pu fournir à l'appelant en égard au prix total, et que d'après cette base le dit appelant a droit à une diminution sur son prix d'acquisition tant pour le défaut de contenance dans l'étendue des dits deux lots numéro 5 et 6 que pour la privation des dits ruelles ci-haut mentionnées, le cout des actes et plans qu'il a produit en cette cause, au montant de $350 ;

" Et considérant que l'appelant était fondé à demander cette indemnité ou

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diminution de prix sous forme de dommages, et qu'il y a erreur dans le jugement rendu par la Cour Supérieure siégeant à Montréal, le vingtième jour de mars 1877;

"Cette Cour casse et annule le dit jugement rendu par la Cour Supérieure le vingtième jour de mars 1877, et procédant à rendre le jugement qu'aurait du rendre la dite Cour Supérieure, adjuge que le dit appelant a droit à une diminution de prix au montant de $350 sur la somme de $913.96, prix stipulé aux dits deux actes de vente du huitième jour d'octobre et du vingt-sixième jour d'octobre, 1874, et en conséquence condamne les intimés à payer l'appelant la dite somme de $350 avec intérêt sur icelle à compter du huitième jour d'octobre 1874, laquelle dite somme de $350 et intérêts seront imputés par les intimés sur et en deduction de la dite somme de $913.96 et des intérêts sur icelle, de manière à réduire le dit prix de vente à la somme de $563.96.

"Et cette Cour condamne de plus les dits intimés à payer à l'appelant les dépens encourus tant en Cour Supérieure que sur le présent appel."

Judgment of S. C. reversed.

Abbott & Co., for appellant.

Doutre & Co., for respondents.

(S. B.)

COURT OF QUEEN'S BENCH, 1878.

MONTREAL, 13TH MARCH, 1878.

Coram MONK, J., RAMSAY, J., TESSIER, J., CROSS, J., TASCHEREAU, J., *ad hoc.*

No. 126.

CHARLEBOIS,

APPELLANT;

AND

LA SOCIÉTÉ DE CONSTRUCTION METROPOLITAINE,

RESPONDENT.

HELD:—That a mortgagee on immoveable property, who has duly registered his mortgage and at the same time registered by memorial the title deed of the mortgagor (making no reference therein to any charges in such title deed), has priority of hypothec over the claim of the *bailleur de fonds* contained in such title deed, and which claim was only registered afterwards (and more than two months after the execution of the title deed), by registering the title deed at full length.

CROSS, J.—On the 6th July, 1874, Alphonse Charlebois, by notarial acte, sold an immoveable to Octave Brunet for $788, who thereby undertook to pay in discharge of Charlebois $428 in capital and interest due to La Corporation Episcopale Romaine de Montréal, Charlebois' *auteur*,—the balance to Charlebois; the property being by the deed declared hypothecated for the amounts by privilege of *bailleur de fonds*.

This deed remained unregistered until the 21st August, 1874, at which time La Société de Construction Métropolitaine, the now respondent, caused a memorial thereof to be registered, indicating the conveyance of the property registered, without mention of any balance being due thereon from Brunet for

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the purchase money which he had so agreed to pay to La Corporation Episcopale and to Charlebois.

On the same day, the 21st August, 1874, the defendant Brunet gave the respondent, La Société Métropolitaine, an obligation for $6,000 with *hypothèque* on the immoveable in question, which was duly registered. It was not until the 7th September, 1874, that the vendor Charlebois, plaintiff in this cause, caused his deed of sale to be registered; he then did so by transcription at full length.

The reason for the registration of the sale by La Société Métropolitaine in the manner they procured the same to be done is evident. They had made up their mind to take security on the property, and, finding that their debtor had not registered his title, they were aware that they could not get a valid hypothec from him on the property until his title was registered; having an interest in procuring it to be done, they accordingly applied for and procured that registered, but they felt no interest in, nor did they attempt to procure the registration of the *bailleur de fonds* held by Charlebois as the vendor to Brunet, nor are they supposed to have known that it had remained unpaid; they had no interest in making the enquiry. For want of diligence on the part of Charlebois this *bailleur de fonds* claim remained unregistered until the 7th September, 1874, as above stated.

Charlebois having obtained judgment against Brunet, caused the property to be sold in this cause, and on the distribution of the proceeds Charlebois, the plaintiff, was collocated in preference to La Société Métropolitaine. They contested his collocation, and on the 18th October, 1876, a judgment of the Superior Court dismissed the contestation. The case being inscribed in Review, that Court, on the 26th March, 1877, reversed the former judgment, and ordered that the Société Métropolitaine should be collocated in preference to Charlebois.

From the last mentioned judgment an appeal has been taken to this Court, and we are now called upon to decide on that appeal whether the registration made by memorial at the instance of La Société Métropolitaine on the 21st August, 1874, of the deed whereby Charlebois conveyed to Brunet the property whose proceeds are in question, was effective to enable Brunet to give a valid *hypothèque* thereon to the prejudice of the *bailleur de fonds* claim due by Brunet, which had not been mentioned in the memorial or registration so effected on the 21st August, 1874.

Various objections were made to the sufficiency of this registration.

1st, That the law gave La Société no right to make this registration.

2nd. That it was obligatory under Art. 2139 C. C. to mention the charges on the property contained in the title sought to be registered.

3rd. The want of the designation of the domicile of the party requiring registration.

Lastly, no mention being made of the delivery of the title, or an authentic copy thereof, to the registrar, as required by Art. 2140 C. C.

It was said, that the requirements of the Art. 2148 of the Code Napoléon were similar to those which our Civil Code exacted by Art. 2139, but that the Code Napoléon was less imperative in its language than our Code, and it expressly allowed a registration by a third party, not a party to the deed, which our Civil

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Code had not done. It was argued nevertheless that, according to authorities cited, 7 Toul. No. 510, Troplong, T. 3, *Privilèges et Hypothèques*, p. 74, 75 and 82, the registration in question would not have been considered effective under the Code Napoléon. That the Art. 2098 C. C. protected the appellant by providing that, so long as the right of the purchaser had not been registered, all conveyances, transfers, hypothecs or real rights granted by him in respect of such immoveable were without effect, and that if the registration had been effected in conformity to the requirements of the law, it would have shewn the *bailleur de fonds* claim of Charlebois.

The Court is of opinion that the memorial registered at the instance of the Société Métropolitaine, on the 21st August, 1874, contained all the essential formalities required by the Art. 2139 of the Civil Code. A distinction is made in the authorities cited by the appellant between formalities which are essential and those which are not; the latter, according to the best opinions, not entailing nullity of registration. There appear to have been slight omissions in the memorial in that instance by the failure to state that it was executed at Montreal, and perhaps in that it failed to state that the Société Métropolitaine had its domicile or chief place of business there, but the nature of the transaction, the parties interested, and the location of the property, indicate that it took place there, and the document was executed by the secretary of a body publicly incorporated about whose domicile and identity there could be no mistake. The Article in question does not say that the domicile is to be stated, it only requires the description of the parties. Here they are sufficiently described to indicate their identity. These informalities were not essential, and could not be held to affect the registration.

It is only in case of its being a claim for money that the memorial should contain mention of the amount due, but here the claim was merely for the registration of the purchaser's title, and that was all the Société Métropolitaine had an interest in procuring the registration of, as regards Brunet's title; and there is no law requiring that everything contained in the title should be included in the memorial. On the contrary, the mere fact that registration is permitted by memorial shews that it may be partial. The Society were not bound to know or enquire as to whether Brunet had paid all unregistered claims on the property. On the contrary, the neglect by the seller to register within the time allowed by law would seem to imply, either that he was paid, or was satisfied with the credit and standing of his debtor without desiring to retain the additional security of the purchaser.

It only remains to discuss the question as to whether the Société Metropolitaine was a party entitled by law to demand the registration.

On the same day that they asked the registration, Brunet, the purchaser of the property, executed in their favor an obligation, hypothecating in their favor the property in question for a loan of $6,000.00; they had therefore an interest in securing themselves, and, if allowable, by the first hypothec upon the property. They were therefore specially interested in procuring the registration of Brunet's title, but not the charges, if any, against it.

By Art. 2136, registration by memorial is effected by means of a summary

setting forth the real rights which the party interested wishes to preserve, which is delivered to the registrar and transcribed upon the register.

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By Art. 2137, the memorial must be in writing, and may be made at the request of any party interested in or bound to effect the registration. Besides these the spirit of the registry law as expressed in other articles shews that parties having a substantial interest have a right to register.

Lastly, it is obvious that the question of the delivery to the registrar of the title or document requiring to be registered, or an authentic copy of it, as specified in Art. 2140, cannot be brought in question; that is a proceeding without which the registrar could not act, but one which does not require to be certified. It must be presumed to have taken place, for without it no registration whatever could have been effected, nor could the registrar have given any certificate respecting it. It is a matter between the party presenting the document and the registrar. The evidence that it was presented is the fact that the registrar certified its registration.

We think on the whole it is a case where the law favors the diligent. That La Société Métropolitaine secured priority by their diligence, and that the judgment of the Superior Court in Review awarding them that priority must stand. It is therefore confirmed with costs.

Judgment of Court of Review confirmed.

Longpré & Dugas, for appellant.

F. O. Rinfret, for respondent.

(S. B.)

COUR SUPERIEURE, 1878.

MONTREAL, 30 DECEMBRE, 1878.

Coram JETTE, J.

No. 1919.

Burroughs vs. *Berthelot* et al.

Jugé:—Que le délai pour la production des plaidoyers au mérite, en Cour Supérieure, est de trois jours francs et juridiques à compter de la demande qui en est faite, et que la forclusion de plaider, ne peut être accordée que le quatrième jour juridique après telle demande. (C. P. C. art. 187, 2e. alinéa.)

Le 6 décembre, qui était un vendredi, demande de plaidoyer fut faite aux défendeurs et ces derniers n'y ayant pas répondu, acte de forclusion fut obtenu contre eux le mardi suivant, 10 décembre, qui était le quatrième jour de cette demande; mais dans ce délai, se trouvait un jour *non juridique*, savoir, un dimanche.

Les défendeurs se prétendant lésés par cette forclusion, firent la motion suivante pour s'en faire relever:—

"Motion des défendeurs qu'attendu que la forclusion obtenue contre eux est "prématurée, irrégulière et illégale, les délais fixés par la loi pour plaider à cette "action, étant de trois jours francs *et juridiques* à compter de la mise en "demeure; et attendu que les délais auxquels ils avaient droit, n'étaient pas "encore expirés lors de la dite forclusion, qu'icelle soit, en conséquence, déclarée

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"prématurée, irrégulière, illégale, nulle et comme non avenue et que les dits "défendeurs en soient relevés, avec dépens."

J. O. Joseph, pour les défendeurs, lors de l'audition sur cette motion, invoqua l'article 137 du Code de procédure Civile, 2e. alinéa, et notamment la version anglaise de cet article, comme étant tout à fait dans le sens de ses prétentions et tellement formelle et explicite, qu'il était absolument impossible de s'y soustraire, ni de donner à cet article aucune autre signification que celle qu'il y attachait lui-même, à savoir: que le délai de trois jours y mentionné, doit être composé de jours *juridiques*.

Il ajouta que lorsque la loi a voulu que des procédés fussent faits dans un certain nombre de *jours juridiques*, elle a toujours eu le soin de l'ordonner d'une manière formelle et positive: c'est précisément, continua M. Joseph, ce qui a lieu pour le cas actuel. Il en est tout autrement des délais établis par les articles 107, 137 (quant aux huit jours y mentionnés), 207, 211, 234, 1070 &c., car en vertu de ces différents articles, les dimanches et jours fériés sont comptés à moins toutefois que ces délais n'expirent un jour férié, auquel cas ils sont continués de plein droit au jour suivant. (C. P. C. art. 24). Pour toutes ces raisons, il n'hésitait pas à conclure que dans l'espèce actuelle, le dimanche ne comptait pas et devait être exclu du délai.

C. S. Burroughs, pour le demandeur, prétendit au contraire qu'il suffisait que le dernier des trois jours en question fût juridique, et allégnait que les *dimanches et jours fériés* devaient compter dans le cas actuel, comme dans les cas ordinaires; et il s'appuyait particulièrement, pour soutenir cette prétention, sur l'article 24 du Code de Procédure, qui porte que: "Le temps du délai court les *dimanches et jours fériés* &c." Il invoquait de plus l'article 137 du même Code, où l'on trouve ce qui suit: "Si le plaidoyer n'est pas produit dans "ce délai (huit jours) la partie adverse peut en faire demande, et s'il n'est pas "produit avant l'expiration du *troisième jour juridique* subséquent, le protono-"taire peut accorder au demandeur un acte de forclusion."

Il inférait donc des termes de ces deux articles, qu'il suffisait pour être en règle, que le troisième jour du délai en question en cette cause fût *juridique*; et pour ces raisons, il croyait la motion des défendeurs mal fondée et en demandait le renvoi.

La Cour, après mûr examen de la question et avoir *délibéré*, adopta les vues des défendeurs et accorda leur motion, mais sans frais.

Motion accordée.

Joseph & Burroughs, procureurs du demandeur.
J. O. Joseph, procureur des défendeurs.
(J. G. D.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 14TH JUNE, 1879.

Coram MONK, J., RAMSAY, J., TESSIER, J., CROSS, J., SICOTTE, J., *ad hoc.*

No. 185.

LA SOCIÉTÉ DE CONSTRUCTION METROPOLITAINE,
(*Plaintiffs in Court below*),
APPELLANTS;

AND

LES COMMISSAIRES D'ECOLES CATHOLIQUES DE LA CITÉ DE MONTREAL,
(*Defendants in Court below*).
RESPONDENTS.

HELD:—That where an *adjudicataire* of an immoveable, under the Insolvent Act of 1875, leased by the insolvent for a fixed term, receives the rent payable under the lease from the tenant after the date of the adjudication, he thereby tacitly confirms the lease to the expiration of such term.

SICOTTE J. Les défendeurs avaient loué de Labelle par bail du 17e décembre 1875 les lieux dont il est question, pour un terme expirant le 1er juillet 1877, à raison de $340 par an, par quartiers, payables les premiers de janvier, d'avril, de juillet et d'octobre.

Labelle ayant été mis en faillite, le syndic Dupuy prit possession de ses biens; et l'immeuble ainsi loué, fut vendu par adjudication le 20 novembre 1876, à la demanderesse. Après la faillite, et longtemps avant la vente, la demanderesse, autorisée par le syndic, a perçu des défendeurs les loyers convenus. Depuis, les loyers lui ont été payés à leur échéance. Le 1er avril 1877 la demanderesse a reçu le paiement du quartier échu ce jour-là. Par ce paiement les loyers étaient acquittés jusqu'au 1er juillet suivant. Les défendeurs ont quitté les lieux à cette date. De là, l'action et la saisie gagerie de la demanderesse; cette dernière prétendant que l'adjudication avait mis fin au bail, et que depuis l'occupation des défendeurs avait continuée par tolérance, et finissant le 1er de mai; que les défendeurs ayant continué leur occupation après le 1er mai, doivent être considérés locataires pour une autre année.

Le jugement attaqué a débouté l'action de la demanderesse, par le motif que le bail avait été accepté par cette dernière, aux termes et conditions arrêtés par le bail.

L'avocat de la demanderesse a cru devoir dire dans son factum que la Cour inférieure avait été guidée plutôt par sympathie que par science légale.

Voyons quelle est la loi applicable dans les circonstances.

L'adjudicataire prend l'immeuble vendu, avec les droits qu'avait le saisi comme propriétaire. Ce sont ces droits autant que l'immeuble, qui sont vendus. De là, on décide que les loyers sont payables à l'adjudicataire, de par son droit d'acquisition, tout comme s'il avait acquis par vente ordinaire.

L'adjudication livre la propriété sans les charges, mais ne détruit pas les prestations dues à l'ancien propriétaire, à raison de ses droits sur la propriété. Ses droits pour ces prestations passent à l'adjudicataire, qui les maintiendra s'il le veut. S'il reçoit les loyers convenus, il acquiesce aux conditions du bail en vertu duquel le locataire occupait les lieux. Les reçus donnés par le nouveau propri-

Société de Construction and Commissaires d'Ecoles.

étaire, constatent son consentement à continuer la location pour le même prix, payable aux mêmes époques, et finissant à la date convenue. En acceptant le quartier échu le 1er avril, la demanderesse acceptait un paiement qui par le bail donnait droit aux locataires d'occuper les lieux non jusqu'au 1er mai suivant, mais jusqu'au 1er juillet, époque où devait finir le bail.

Tous ces faits constatent que les parties ont considéré le bail et ses conditions, comme étant leur convention et la loi réglant leur rapports de locateurs et locataires.

La Cour déboute l'appel, et confirme le jugement.

Judgment of S. C. confirmed.

F. O. Rinfret, for appellant.
Ouimet & Co., for respondents.
(S. B.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 21st JUNE, 1879.

Coram Sir A. A. DORION, C. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 169.

THE NATIONAL INSURANCE CO., APPELLANTS;

AND

HATTON, RESPONDENT.

HELD:—1. That an agreement between a promoter of a company and a subscriber for shares, that the latter shall pay for his stock in services, will not bind the company.

2. That even if the shares of those who subscribed before the respondent were reduced, without his knowledge, after he subscribed, yet if he, after obtaining knowledge of that fact, did not immediately repudiate his stock, but, on the contrary, paid a first instalment thereon, and took an active part, both as solicitor and shareholder, in promoting the affairs of the company, he will be liable to pay the calls on the stock held by him as they are made by the Directors.

RAMSAY, J. This is an action on calls alleged to be due by a shareholder.

Respondent, defendant in the Court below, pleaded:

(1) No call by a legal board of directors;

(2) That defendant was induced to take shares by a fraudulent stock subscription list;

(3) That defendant took shares with understanding to pay them by his services as solicitor and counsel;

(4) General issue.

The first and second pleas need alone occupy the attention of the Court. With regard to the third, it is plain that a company may agree to take payment of stock in any shape it pleases; but a secret understanding between a promoter and a shareholder that the latter shall pay for his stock in services will not bind the company. It would be a transaction precisely similar in character to that reproached to Ogilvie and Goff as a fraud on other subscribers.

The judgment in the Court below took this view, and it also virtually disre

garded the first plea, but it dismissed the plaintiff's action on the ground that the calls were irregular, inasmuch as two other shareholders, Ogilvie and Goff, had been allowed to reduce their shares, and that the calls had only been made on the shares so reduced. There can be no doubt that the general principle on which this judgment turns is correct, and that, if the directors made an unfair call, the shareholder might decline to pay. This was not, however, respondent's pretention. He sought to be declared not a contributory on the ground of fraud. There is some contradiction in the evidence as to whether he had signed after Ogilvie and Goff had reduced their subscriptions. But it seems to me that Hanson's evidence fixes a date when these reductions took place, which governs the whole case. Others may be mistaken as to the order of events; but the fact he swears to is rendered positive by a circumstance. He left Montreal in the end of May, 1875, taking with him a statement of stockholders in which Mr. Ogilvie appears as a subscriber for the reduced amount. At this time the respondent was actively engaged as a promoter of the Company, attending its meetings and advising as the Solicitor of the unorganized Company. Later, about the end of September, the Company was organised, and the three principal officials were Ogilvie, Goff and Hatton. Is it probable, or indeed is it credible, that these parties did not know for what amount of stock each was subscriber? Again, is it possible that Ogilvie could have reduced his shares from 200 to 50 more than four months before he was elected president, and Hatton not know it? But, if such a thing were conceivable, how can he get over the payment of the 1st call of $10 per share three months later? As Solicitor of the Company he must have known as well as he does now whether that was a legal call or not. He paid and induced others to pay it.

But there is still another view of the case. The change of Ogilvie's subscription was certainly made before the Company was organized. Hatton was a promoter, he allowed the Company to be formed ostensibly with its president as a subscriber of only 50 shares, and now he turns round and says: "I won't pay you, the Company, what I owe (for he is evidently a contributory, and the judgment appealed from takes that ground), because the Company so organized is dealing unfairly by me in letting Mr. Ogilvie escape from three-fourths of his obligations as a stockholder." But Mr. Hatton had acquiesced in this for two years, and until the time he ceased to be the Solicitor of the Company. What sort of fairness would this be to hold the other shareholders who have paid their calls—one at all events made at Mr. Hatton's own suggestion, or with his approval, and to absolve him? Mr. Hatton may have his action against those who have misled him, but he cannot be allowed to aggravate the position of others who have been perhaps lulled into security by his acquiescence. There is no unfair dealing on the part of the directors; they have made the call on the stock list as it has stood for years.

We are therefore of opinion that Mr. Hatton is liable for these calls, and the judgment of the Court below must be reversed.

The following is the written judgment of the Court:—

"The Court * * * considering that the respondent hath failed to prove that he was induced by fraud and through error to subscribe the fifty shares of stock he holds in the capital stock of the Company appellants;

The National Insurance Co., and Hatton.

"And considering that the respondent has not proved that he repudiated his stock, or that he has adopted proceedings to be relieved thereof, as soon as he became aware of the changes in the subscription book of the stock of the Company appellants, by which the number of shares originally entered in the name of A. W. Ogilvie and E. H. Goff were reduced, and that, having acted as a shareholder of the Company long after he was aware of said changes, he thereby waived any right to be relieved of his liabilities as a stockholder on account of any such changes;

"And considering that the said respondent hath failed to prove that the calls made by the Company appellants, and for which the present action has been instituted, were either illegal, partial or unjust;

"And considering that there is error in the judgment rendered by the Superior Court sitting at Montreal on the 8th day of July, 1878;

"This Court doth cancel and reverse the said judgment of the 8th day of July, 1878, and, proceeding to render the judgment which the said Superior Court should have rendered, doth condemn the respondent to pay to the appellants the sum of $1000, with interest thereon from the 27th day of July, 1877, and also to pay to the said appellants the costs incurred in the Superior Court and on the present appeal."

Judgment of S. C. reversed.

Gilman & Holton, for appellants.
Strachan Bethune, Q. C., Counsel.
John L. Morris, for respondent.
T. W. Ritchie, Q. C., Counsel.
(S. B.)

COUR SUPERIEURE, 1878.

MONTREAL, 2 MARS, 1878.

Coram RAINVILLE, J.

No. 579.

Re Marcel Jeannot dit Lachapelle, Failli, et La Compagnie de Prêt et Crédit Foncier, Réclamante, et John Pope et al., Contestants.

JUGÉ:—Que la mention qui est faite dans un acte d'obligation, qu'il existe une hypothèque antérieure, n'est pas suffisante pour donner priorité d'hypothèque au créancier ainsi mentionné, si son titre n'est pas régulièrement enrégistré, et n'est pas censé un consentement de la part du deuxième créancier hypothécaire à telle priorité, son consentement devant être expressément formulé.

Le premier jour d'Avril, 1874 le failli à consenti a la réclamante une obligation avec hypothèque sur une propriété située à la Longue Pointe. Cette obligation a été régulièrement enrégistrée. Le délai pour renouveler l'enrégistrement expirait le 30 Avril 1876. Ce renouvellement fut fait, mais sous un mauvais numéro du cadastre, en sorte qu'il n'y avait pas de renouvellement valide. Le 28 Juin 1875, le failli a consenti une deuxième obligation et hypothèque sur la même propriété en faveur des contestants, et le failli déclarait par cet acte qu'il était dû sur la propriété une somme de $2500 à la réclamante.

Re Jeannot Insolvent.

Mais à ce moment l'hypothèque donnée à la réclamante n'apparaissait pas par le certificat du régistrateur. La réclamante, le deux Août 1876, s'étant aperçu de l'erreur, donne un nouvel avis au régistrateur rectifiant le numéro de la propriété. Le délai pour effectuer le renouvellement était alors passé, et l'acte d'obligation consenti par le failli aux contestants était enrégistré. La propriété grevée de ces hypothèques est vendue par le Syndic qui colloque la réclamante pour le montant de sa créance, et les contestants produisent une contestation demandant à être colloqués de préférence à la réclamante, vu que son obligation n'ayant pas été renouvelée dans le délai voulu par la loi pour le renouvellement des enrégistrements, les contestants se trouvaient à avoir priorité d'hypothèque.

La réclamante à répondu que l'existence de son obligation ayant été énoncée dans l'acte d'obligation consenti par le failli aux contestants, ceux-ci ont par le fait reconnu le droit de priorité de son hypothèque.

A l'argument les contestants firent valoir au soutien de leur prétentions l'art. 2085 du Code Civil du Bas-Canada, aussi Code N. art. 1071, Pont, Privilége, No. 728.

La réclamante au soutien de la proposition que les contestants avaient reconnu son droit de priorité a référé la Cour aux autorités suivantes.

C. C. B. C. art. 2048.

9 L. C. Reports, p. 182, Symes vs. McDonald. Table Générale, Sirey vo Hypothèque, Nos. 209, 210, 211, 212. Pothier, Vol. 1 (Ed. Bugnet) p. 659, No. 62; p. 660, No. 64.

RAINVILLE, J. Je suis d'opinion que les contestants doivent réussir malgré la clause de leur obligation constatant l'exisfence d'une hypothèque antérieure sur la propriété. Il était nécessaire que leur consentement à donner priorité d'hypothèque, à la réclamante fut expressément formulé. Les décisions françaises citées par la réclamante ne s'appliquent pas absolument, et en référant aux rapports de ces décisions on verra qu'il y avait dans les actes une clause stipulant priorité d'hypothèque ou déclarant la propriété franche et quitte, et alors le créancier hypothécaire antérieur comparaissant à l'acte même comme témoin, était censé y donner son assentiment. Il y a une décision rapportée par Dalloz au 9ème Vol. Jurisp. du Royaume, vo. Hypothèque et Privilége, chap. 2, sect. 8, p. 418, qui règle la question.

" Le créancier premier inscrit doit être préféré à un créancier dont le titre " hypothécaire est antérieur au sien, mais n'a été inscrit que postérieurement, " alors même que dans l'acte qui a conféré l'hypothèque au second créancier, le " débiteur commun aurait déclaré que l'immeuble était grevé d'une autre " hypothèque (Deloos c. Rodrigue)."

Voici le jugement de la Cour d'Appel de Bruxelles, rendu le 6 Juin 1809:

" La Cour attendu que la clause énonciative d'une hypothèque antérieure " en l'acte du 16 floréal au 9 dont l'intimé se prévaut, ne faisait pas obstacle à " ce que celui-ci put acquérir la priorité sur les biens hypothéqués en vertu " d'une inscription prise dans les termes de la loi du 11 Brumaire au 7, en raison " que de cette clause il ne résultait aucune convention d'où l'appelant put

Re Jeannot, Insolvent.

"inférer un droit de préférence stipulé en sa faveur même pour le cas qui se "présente ; met l'appellation au néant, etc."

Cette décision me parait s'appliquer parfaitement à la présente cause. (1)

Le jugement est motivé comme suit :

"La Cour ayant entendu les parties sur la réclamation et la contestation d'icelle, examiné la procédure, les pièces produites, la preuve, et sur le tout délibéré ;

"Considérant que le délai fixé par la loi pour renouveler l'hypothèque de la réclamante expirait le 30 Avril 1875 ;

"Considérant que la réclamante n'a renouvelé l'inscription hypothécaire que le 2 Aout 1876 ;

"Considérant que le contestant a pris inscription et a enrégistré son hypothèque le 3 juillet 1875 ;

"Considérant que la déclaration faite par le failli dans l'acte d'obligation du 28 juin 1875, qu'il existait une hypothèque de $2000, en faveur de la réclamante sur la propriété hypothéquée n'était qu'une clause énonciative ;

"Considérant qu'en vertu de cette déclaration il ne résultait aucune convention d'où la réclamante put inférer un droit de préférence stipulé en sa faveur, et que cette déclaration ne la relevait pas de l'obligation de renouveler son hypothèque dans le délai prescrit par la loi ; maintient la contestation et ordonne que le Bordereau de dividende soit réformé, et que les dits contestants y soient colloqués pour la somme de $625.33 de préférence et avant la dite réclamante, et aussi avec intérêt de sept par cent. sur la dite somme depuis le 28 Sept. 1875, le dit intérêt se montant à la somme de $42.07 courant, et ordonne de plus que l'item numéro cinq ou cinquième du dit Bordereau de dividende soit réduit de la dite somme de $667.40 courant, et que les dits créanciers contestants soient colloqués sur le dit Bordereau de dividende pour la dite somme de $667.40, avec dépens distraits à MM. Kerr & Carter, avocats des contestants."

Contestation maintenue.

Laflamme, Laflamme & Adam, pour la réclamante.
Kerr & Carter pour les contestants.
(L.L.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 17TH MARCH, 1879.

Coram MONK, J., RAMSAY, J., TESSIER, J., CROSS, J., ROUTHIER, J., *ad hoc.*

No. 162.

DOUTNEY,

APPELLANT;

AND

RICHARD ET AL.,

RESPONDENTS.

HELD:—1. That an onerous donation is in the nature of a sale, and, therefore, such a deed made notarially in November, 1866, but not countersigned, and followed by possession, was not *ipso jure* null and void, and was good under any circumstances, so far as the moveables given were concerned.

2. That a resiliation of such a deed, obtained from the donee without legal consideration and by fraud and *dol*, will be set aside.

RAMSAY, J. The late Laurent Richard, by deed styled donation, dated 10th

(1) Vide Delesderniers vs. Kingsley, 3 L.C.R. 84; Colville & Building Society, 2 R.L. 281.

November, 1866, made over to the respondents a lot of land and certain moveables, animals and agricultural instruments.

After the death of Laurent Richard, the appellant, who claims to represent the succession of Laurent Richard, discovered that the so-called donation was not countersigned, and he notified the respondents that he would bring an action to recover back the subject of the donation, unless they agreed to the resiliation of the deed. Under this pressure, they, by deed of the 2nd February, 1871, agreed to the resiliation of the deed of the 10th November, 1866, and by a deed of compromise of the 6th September, 1871, they agreed to submit to arbitration the claim for enjoyment of the property from the time of the donation, 10th November, 1866, to 3rd February, 1871.

The present action is to recover from the respondents the enjoyment of the land, animals and instruments, $606.66; the value of articles taken away by appellants, $700; hay, grain, etc., accumulated by Laurent Richard, $650; and for the materials of a building, $150; making in all the sum of $2,106.66.

The appellant met this action by several pleas.

First, they set up the deed of 10th November, 1866; alleged it was really a sale; that appellant deceived them into believing that they had no valid title, and that he represented the succession of Laurent Richard; that he did not represent the heirs, and that it was by error they had agreed to the resiliation. They concluded that the act of resiliation be declared null.

Secondly, they set up that, even if the deed of the 10th November, 1866, were a donation bad in form, it had its effect up to the date of the resiliation, and consequently that the respondent should not be liable for the use and occupation of the land and the animals and other effects, or those they had not had, or that were no longer in existence; that they had only had to the value of $35, which was fully compensated by a counter account of $305. They also alleged the fraud and *dol* of appellant, the irregularity of the *compromis* and award, and concluded for the setting aside of the deed of resiliation and the *compromis* and award.

Thirdly, they set up the value of the *jouissance* of the land, effects, grain, etc. at the time of the donation, and the materials of the building destroyed, at $789, and they pleaded in compensation amounts equal to $810.99.

The judgment appealed from adopts the conclusions of the first plea, that is, it declares the deed of donation to have been an alienation *à titre onéreux*, the resiliation to have been obtained without cause and by fraud, as also the *compromis*, and it sets these two last-named deeds aside, as also the *sentence arbitrale*, and it dismisses appellant's action.

In so far as regards that part of the judgment dismissing the action, I think there can be very little doubt that it should be confirmed. However imperfect the deed of donation may have been, and however completely respondents may be estopped from questioning either appellant's title to represent the heirs of Laurent Richard, or the view of the law which induced them to consent to the deed of resiliation, it must be evident that the appellant cannot be called on to account generally for what was done under the deed of the 10th November, and before its resiliation. So far even if it were a donation it was only bad in form

Destrey and Richard et al.

as to the real estate. It was not requisite there should be a deed in notarial form for the moveables. The rent was moveable of its nature. The deed of resiliation (2nd February, 1871) annuls the so-called deed of donation, and leaves the estimation of the occupation from the time of the donation till the resiliation and other *réclamations quelconques* to be decided by arbitration.

Any difficulty on this point might have been obviated if the action had been brought on the *compromis* and on the award; but the appellant does not invoke them. We are, therefore, forced back on the original rights of the parties. If we are to arbitrate, we cannot say that the appellant is entitled to anything for the time respondents held the land further than was stipulated between them and the late Louis Richard.

But the judgment goes further. It not only dismisses the action, but it sets aside the deed of resiliation, the *compromis* and the award as being all entered into owing to the fraud and *dol* of the appellant. And here arises a question which was very ably argued in appeal, namely, whether this deed of resiliation is or is not a transaction. The point is of some importance. If it is, error of law simply will not affect its validity. The object of the transaction is to arrive at a solution of the legal right without an appeal to the Courts. It is in reality a *compromis* as to matter of law. But respondents ingeniously argue that, since it is a compromise, a deed which is only a giving up all on one side cannot be a transaction; that the deed in question is one-sided, and that consequently it is only a resiliation and not a transaction, consequently he may avail himself of the *erreur de droit*. However interesting this discussion may have been under the old law, I think the terms of Art. 1918 C.C. leave no room to doubt what is now our law: "Transaction is a contract by which the parties terminate a lawsuit already begun, or *prevent future litigation* by means of concessions or reservations made by *one* or both of them." The concessions or reservations may then be made by one, and still the contract be a transaction. Has it the necessary ingredients? I don't think it has. It seems to me that, to constitute a transaction, it is necessary that the deed should set up the legal consideration, so as to show that the parties intend to transact as to the law. If this does not appear, the deed becomes a simple resiliation; at least, I cannot see any other mode of distinguishing between a resiliation and the transaction. This view is fortified by the terms of Art. 1922 C.C., which makes it necessary in a transaction to refer to a deed that was null in order to cover it. In a word, in a transaction the consideration is the legal difficulty, and it must specially appear that the parties intended to compromise as to their legal rights, else it is no transaction. We have, therefore, only to look at this deed of the 2nd February, as a deed of resiliation, and without going the length of accusing the appellant of fraud, it appears to me clear, that, whether fraudulently or not, he misled the respondents, and induced them to pass a deed without any consideration. The Court sees no difficulty in confirming the judgment except as to a matter purely of detail. We are disposed to sustain the judgment, putting in a few words in the *dispositif* to avoid the impression that we are deciding anything as to the real estate. The issue raised was as to moveables, and we have not to decide as to the real estate. The judgment is as follows:—

" The Court * * * considering that the deed of date 10th November, 1866, from the late Laurent Richard to the defendants, though styled a donation, was sufficiently onerous to be in the nature of a sale, and the defendants have since been in possession of the immoveable and effects intended to be conveyed to them by said deed; Dautney and Richard et a

" Considering that they were induced by fraud and *dol* of the plaintiff, and without legal consideration, to agree to the resiliation of date 2nd February, 1871, and the compromise and award of date 6th September, 1871;

" Doth grant the conclusions of defendant's first plea, and doth therefore annul and declare of no effect the *acte* of resiliation, of date 2nd February, 1871, passed before Mtre. P. Mathieu and his colleague, notaries, between plaintiff and defendants in so far as regards the matters in dispute and the compromise between the said parties, of date 6th September, 1871, passed before F. Piché and his colleague, notaries, and also the *sentence arbitrale* of same date made by Louis Blain and Joseph Collette before Mtre. F. Piché and his colleague, notaries, and the Court doth therefore dismiss plaintiff's action and demand with costs;

" And considering that there is no error in the judgment appealed from, to wit, the judgment rendered by the Superior Court for Lower Canada on the 30th May, 1877, this Court doth confirm the said judgment with costs."

Judgment of S. C. confirmed.

Doutre & Doutre, for appellants.
Lacoste & Globensky, for respondent.
(S.B.)

COURT OF REVIEW, 1879.

MONTREAL, 29th NOVEMBER, 1879.

Coram SICOTTE, JOHNSON, LAFRAMBOISE, JJ.

No. 938.

In re Middlemiss, insolvent, *Darling*, assignee, *Jackson*, collocated, and *Leduc*, contesting.

Leduc sold to one Rice a parcel of land on which there was a hypothec in favor of Brodie. It was stipulated in the deed of sale that Rice should pay Brodie the amount of his claim. Brodie accepted the delegation, but without discharging Leduc. It was further stipulated in the deed that Rice should have the right of releasing any portion of the land from Leduc's hypothec for the balance of *prix de vente* by paying at the rate of $400 per arpent for the portion discharged. Rice subsequently sold the land to Middlemiss, who, exercising the right of discharge above mentioned, paid a sufficient sum on account of the purchase money to release half the property from Leduc's hypothecary claim. Middlemiss also obtained from Brodie the release of the same portion of the land [which he was about to dispose of] from Brodie's hypothecary claim, which was then restricted to the other half. Middlemiss afterwards became insolvent, and, the remaining half of the property being sold by the assignee, Leduc contested Brodie's right to be collocated by preference to him on the proceeds thereof.

HELD:—That Brodie having accepted the delegation without discharging Leduc, novation did not take place, and the release by Brodie, of half the land, applied solely to his hypothecary claim thereon, and did not affect his privilege on the rest of the land for the amount of said claim. Brodie was therefore entitled to be collocated by preference to Leduc.

The judgment inscribed in review was rendered by the Superior Court, Montreal, (JETTE, J.,) 13th September, 1879, as follows:—

Re Middlemiss and Leduc.

JETTE, J. Par la feuille de dividende préparée par le syndic en cette affaire, Jackson, cessionnaire de Brodie, et subrogé à ses droits, a été colloqué sur le prix de vente d'un immeuble du failli situé aux Tanneries, pour une somme de $1200, de préférence au contestant Leduc, aussi créancier hypothécaire du failli pour une somme de plus de $3000. Les faits suivants ont donné naissance à ce litige.

En 1863 Dominique Leduc, alors propriétaire de l'immeuble en question en cette cause, consent une obligation à Maurice Gougeon, avec hypothèque sur sa terre. En 1864 cette créance est transportée par Gougeon à *Hugh Brodie*, et, subséquemment Dominique Leduc ayant vendu sa terre à Benjamin Leduc, (le contestant) celui s'oblige personnellement de payer à Brodie le montant de l'hypothèque sus-mentionnée.

Le 19 mars 1874 Benjamin Leduc, acquéreur de la terre hypothequée a Brodie, vend cette même terre à Rice, moyennant une somme de $16,000 00

Cette somme est stipulée payable comme suit :

1°. Comptant	$500 00	
2°. En Avril 1874	500 00	
3°. En Mai "	1,000 00	
4°. En Août "	2,000 00	
5° La balance $12,000 00 en 12 paiements annuels de $1,000 00 le 1er. d'Août chaque année, à compter de 1er. d'Août 1876	$12,000 00	
		$16,000 00

Il est stipulé par cet acte que l'acquéreur (Rice) *aura droit* s'il vend partie de la dite terre et aussi souvent qu'il le requerra, avant que les dits paiemens ne soient échus, *de faire décharger l'hypothèque des vendeurs* en payant $400 par chaque arpent de terrain qu'il voudrait ainsi faire dégrever, ces sommes devant être déduites des derniers paiemens à échoir.

Leduc, par le même acte, délègue ensuite Rice de payer à Brodie, en déduction de son prix d'achat, le montant de l'hypothèque de ce dernier, et ce dans un an, de la date du dit contrat. Cette délégation est acceptée par Brodie, mais sans décharge de sa part, par conséquent sans *novation* de sa créance.

Rice vend ensuite à Middlemiss qui prend toutes les obligations de son vendeur.

Le 4 juillet, 1874, Middlemiss ayant échangé moitié de ce terrain avec le gouvernement provincial et ayant promis de le livrer franc et quitte de toute hypothèque, vient trouver Leduc le vendeur, et lui paye les $2000 à écheoir en Août suivant, plus $6000 en à compte des $12,000 restant, cette somme de $6000 à imputer sur le derniers paiemens à écheoir, aux termes de la vente par Leduc à Rice. Deplus Middlemiss exige et obtient, aux termes de ce contrat de vente à Rice, la décharge de Leduc pour la moitié du dit terrain, les $6000 représentant $400 par arpent pour cette moitié.

Après avoir obtenu cette décharge de Leduc, Middlemiss va trouver Brodie, lui représente qu'il est suffisamment garanti pour ses $1200 sur l'autre moitié du terrain, et obtient de lui la décharge de son hypothèque sur cette première moitié déchargée par Leduc. Cette décharge de Brodie est du 6 juillet 1874.

Re Middlemiss and Leduc.

Middlemiss étant tombé en faillite, cette seconde moitié de la terre Leduc est vendu par le syndic, et ne rapporte pas suffisamment pour payer les $1200 dûes à Brodie et $3000 de balance à Leduc. Brodie est colloqué de préférence à Leduc pour ses $1200 et ce dernier conteste cette collocation en disant : que par l'acte du 19 mars 1874, Brodie a été subrogé aux droits de Leduc et à son hypothèque contre Rice pour le paiement de ses $1200, et qu'il a accepté cette délégation et cette subrogation. Que par suite il est devenu obligé envers Leduc de ne rien faire qui pût diminuer la garantie qui lui était ainsi cedée, et qu'en déchargeant la première moitié de l'immeuble hypothéqué il se trouve à faire perdre à Leduc son récours pour autant sur la seconde moitié, ce qui le rend garant et responsable envers Leduc du tort que celui-ci éprouve. Il demande donc à ce que la perte résultant de l'insuffisance du produit de l'immeuble soit supportée proportionnellement par Brodie et lui-même.

Le contestant Leduc me parait, dans sa contestation, perdre complètement de vue, ce fait important que les droits de Brodie résultent de deux titres tout à fait différents et complètement distincts. Or il suffit de se rendre compte des droits découlant de ces deux titres, pour arriver à une conclusion qui me parait inébranlable.

Par l'acte du 19 mars 1874, Leduc vend à Rice et sur le prix il délègue à Brodie, son créancier personnel et hypothécaire, une somme de $1200 qu'il lui doit.

Brodie accepte cette délégation, mais sans décharger Leduc.

Donc pas de novation.

Quel est l'effet de cette délégation, sans novation ?

Brodie, créancier de Leduc, avec hypothèque générale sur le terrain vendu, conserve cette créance intacte : c'est-à-dire, sa créance personnelle contre Leduc, et son hypothèque générale sur la terre.

De plus il devient créancier de Rice : créancier personnel, et créancier hypothécaire en autant que Leduc le subroge à lui et à ses droits pour la somme déléguée.

Or, quels sont les droits hypothécaires de Leduc ?

Leduc a bien son hypothèque de vendeur sur la propriété de Rice, pour le paiement du prix, *mais cette hypothèque est subordonnée à la condition*, stipulée en faveur de Rice, qu'en payant $400 par arpent elle sera déchargée.

Après avoir ainsi soumis l'existence de son hypothèque générale à cette condition, Leduc délègue $1200 à Brodie, avec l'hypothèque garantissant ce paiement, c'est-à-dire avec l'hypothèque générale soumise à la condition de la décharge sur paiement de $400 par arpent.

Les droits de Brodie par suite de cette opération se trouvent donc comme suit :

1o. Il a sa créance personnelle contre Leduc.

Et pour la garantir, une hypothèque générale sur toute la terre vendue.

2o. Il a en outre, une créance personnelle contre Rice.

Et pour la garantir *l'hypothèque conditionnelle*, créée en faveur de Leduc, et que ce dernier lui a transportée par la délégation.

Donc, il a *deux hypothèques*.

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La première générale et *absolue*, procédant de son premier titre.

La seconde générale aussi, *mais soumise à la condition de la décharge, par Leduc*, de chaque arpent pour lequel il serait payé, à ce dernier, $400.00.

Quant à la première, il est évident qu'il est dans la position de tout créancier ordinaire ayant une hypothèque générale, et pouvant en disposer à son gré, l'exercer où il veut, l'abandonner pour partie, etc., sans que le créancier avec hypothèque générale ou spéciale qui vient après lui puisse s'en plaindre.

Quant à la seconde, il ne peut évidemment avoir plus de droits que Leduc ne lui en a cédés.

Or Leduc n'avait qu'une hypothèque soumise à la condition de la décharge de chaque arpent de terrain sur lequel serait payé $400. En chargeant Rice de payer $1200 à Brodie et en subrogeant ce dernier à ses droits contre Rice, pour cette somme, il n'a donc pu lui transmettre que cette hypothèque, avec la condition y attachée, c'est-à-dire résolubie sur paiement de $400 par arpent, *par le seul fait de la décharge de Leduc lui-même.*

Quel est maintenant le résultat de cette distinction ?

C'est que lorsque Leduc a, le 4 juillet 1874, déchargé les 20 arpens de front de la terre en question, il a complètement anéanti l'hypothèque créée par Rice en sa faveur, c'est-à-dire, tant la partie de cette hypothèque qu'il avait cédée à Brodie, que celle qu'il s'était réservée à lui-même, puisque l'hypothèque entière, avant la délégation à Brodie, était soumise à la condition de la décharge par Leduc sur paiement de $400 par arpent.

Et lorsque Brodie a, le 6 juillet, déchargé ces mêmes 20 arpens de *son hypothèque*, ce n'est pas de l'hypothèque garantissant la somme à lui déléguée, qu'il a donné main-levée, (puisque celle-là avait disparu par la décharge de Leduc) mais de son hypothèque à lui, résultant de son propre titre, c'est-à-dire, celle qu'il avait de son propre droit, non plus comme délégataire, mais comme créancier ordinaire, et dont il pouvait disposer à son gré sans encourir de responsabilité envers qui que ce soit.

Leduc est donc mal fondé à se plaindre de cette décharge que Brodie était en droit d'accorder sans encourir aucune responsabilité envers lui, et par suite la collocation de Jackson, qui est aux droits de Brodie, est bien fondée et doit être maintenue.

The above judgment was confirmed in Review.

SICOTTE, J. Leduc a contestée la collocation faite au profit de Jackson, dans la distribution des deniers provenant de la vente des immeubles du failli Middlemiss. Cette contestation a été déboutée. En mars 1874 Leduc vendit l'immeuble dont il s'agit à Rice pour $16,000. L'acte de vente contient les deux clauses suivantes: 1o. The purchaser shall have the right to sell any portion of said land, should he see fit to do so; and cause the vendors to discharge their hypothèque on the same, on paying at the rate of $400 per arpent, to be deducted out of the last payment.

2o. Notwithstanding the terms of payment hereinbefore mentioned, such purchaser will pay and deduct from said payments to Robert Brodie $1230 in one year from this.

Le 4 juillet 1874, Leduc ayant reçu par Middlemiss qui avait acquis de Rice.

les $400 convenues pour vingt arpents, donna décharge et main-levée de son privilége et hypothèque de bailleur de fonds sur les 20 arpents, déclarant que c'était sans préjudice à sa dite hypothèque, et privilége de bailleur de fonds sur la balance du terrain vendu. Tout ce qui était dû alors à Leduc était $14,000, de sorte que déduisant le paiement de $8,000, il restait à payer $6,000.

Le 4 juillet, Brodie donna aussi main-levée de son hypothèque, sur ces 20 arpents.

Ce qui restait de cet immeuble a été vendu par autorité de justice, sur Middlemiss pour une somme insuffisante pour satisfaire la dette de Brodie, et celle de Leduc.

Par sa contestation Leduc demande qu'une ventilation soit ordonnée pour constater la valeur des 20 arpents que Brodie a déchargés de son hypothèque sans son consentement, et à ce que la collocation de Jackson, qui est aux droits de Brodie, soit réduite, suivant que de droit.

Il faut déterminer la condition légale de Brodie, comme créancier et comme délégataire.

Longtemps avant 1874, Brodie était créancier hypothécaire, avec privilége de bailleur de fonds. Comme tel créancier, il pouvait diviser son hypothèque, et la restreindre à une portion quelconque de l'héritage. Leduc ne lui a pas remis ou cédé de gage, en ordonnant à Rice de lui payer ce qui lui était dû, mais il lui a désigné un autre débiteur. Brodie n'a rien obtenu de Leduc de plus qu'il n'avait auparavant. La garantie hypothécaire de Brodie, ne procède pas de Leduc, mais indépendamment de la vente par ce dernier à Rice, et de la délégation ou plutôt de l'indication d'un nouveau débiteur, l'hypothèque de Brodie est restée, ce qu'elle était, et ne pouvait être affectée par les faits de Leduc. Ainsi Brodie, en déchargeant partie de l'héritage de son hypothèque, a exercé un droit découlant de son chef, et qui n'était en aucune manière soumis au contrôle ou à la surveillance de Leduc. Brodie pouvait faire avec Rice ce qu'il pouvait faire avec Leduc.

Quelle est la condition de Brodie comme délégataire? Il est partie à l'acte de vente; une des conditions de cette vente est que Leduc s'oblige de donner main-levée de son hypothèque et de son privilége de bailleur de fonds sur vingt arpents de la chose vendue, si on lui paie $8,000; c'est ce qu'il a fait le 4 juillet 1874. Par cette main-levée il a détruit son gage et son privilége, quant à ces 20 arpents. Brodie, présent au contrat et acceptant l'indication de paiement faite sous tel engagement par le vendeur, a consenti, comme Leduc, à restreindre son hypothèque à la portion de l'héritage, tel qu'il se trouverait après la distraction arrêtée et convenue.

Rice ayant payé Leduc pour ces 20 arpents, ce dernier n'avait plus de prix de vente due sur ces 20 arpents, et ne pouvait en faire délégation. Indépendamment de toute main-levée de sa part, Brodie, partie à cette convention, ayant donné son assentiment, elle se trouvait acquise au profit de Rice, par celle accordée par Leduc. Les deux parties ont alors agi sous la certitude qu'elles avaient, que la portion du terrain qui demeurait grevée de leur dette, valait

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amplement pour l'acquitter. Il n'appartient ni à l'un ni à l'autre de changer leurs conditions respectives.

Le jugement doit être confirmé.

Keller & McCormick, for Jackson, collocated.

Wurtele, Q.C., counsel.

T. & C. C. DeLorimier, for Leduc, contesting.

(J.K.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 21st JUNE, 1879.

Coram HON. SIR A. A. DORION, Ch. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 68.

STANTON, APPELLANT;

AND

THE HOME INSURANCE CO., RESPONDENTS.

HELD:—1. That where the loss under a fire insurance of goods is made payable to a party other than the person who effects the insurance, and such third party becomes owner of the goods by a transfer to him of the warehouse receipt of such goods, such third party becomes thereby the party assured, and can, therefore, legally make all necessary preliminary proofs of loss.

2. That in this particular instance the proof of loss was not satisfactorily established.

This was an appeal from the judgment of the Superior Court at Montreal, reported at p. 211 of the 21st vol. of the L. C. Jurist.

MONK, J., *dissentiens*:—I think the judgment complained of should be reversed. The Court here is unanimously of opinion that the ground assigned by the Court below for dismissing the action was not well founded. But the majority of the Court are of opinion that it is not made out that the oil was in the shed at the time of the fire; therefore the insured sustained no loss, and the judgment should be confirmed on this ground. The question arises, as to the party on whom the burden of proof lay. As a general rule, it is the insured who has to prove the loss. But, under the circumstances, the judges in the minority are inclined to believe that it was the duty of the insured to prove that the oil was not there. They appear to have attempted to make such proof, and failed.

TESSIER, J., *dissentiens*, concurred in the views expressed by MONK, J.

RAMSAY, J. The first question in this case is as to who was the party insured. It is contended by the respondents that the assignee of the policy is not the party insured, and that therefore he cannot make the particular statement in writing required by the conditions of the policy, but that this must be made by the party originally insured. It seems to me that this interpretation cannot be sustained. Of course, in one sense the party insured is the original party, and not the transferee, but as a general principle under our law the insurance follows the property and goes to the purchaser, unless the change of the ownership increases the risk. 2 Pardessus, p. 271, Grun and Joliat, Nos. 86 and 327,

who says Emerigon is of the same opinion. But the policies limit this usually, and indeed so generally is this limitation made, that the English law has taken another direction, and so been incorporated in our Code, without hesitation;—Arts. 2483 and 2576. I think, however, that when the transfer accords with this last article, and with the conditions of the policy, it becomes an acceptance of the new owner as the assured. Therefore Stanton was the assured, and properly made the declaration. It is evident that the party who is to make the statement is the person who is to benefit by the insurance directly, and that the original insured is probably not in a position to make a particular statement as to the fire, and is certainly not interested in taking these proceedings. Stanton and Home Ins. Co

The remaining question is one of fact—whether there is evidence that the object insured has been destroyed by fire. The evidence of Ruston establishes that the oil existed when Ruston got the warehouse receipt from Middleton, if Ruston is to be believed. But Ruston's evidence is open to considerable suspicion. His means of procuring so large a quantity of oil do not appear. On the contrary, from what can be learned of his position, he was in no important business at all. If he had really been the owner of 480 barrels of oil, he could certainly have shown us whence he got it. He wishes it to be understood that it was oil of Middleton & Co. which he had bought from that firm; but the books of Middleton & Co. do not help his testimony in any way. If it be contended that there is a book—the general receipt and delivery book—missing, which would clear up the difficulty, the answer is easy, and not in Ruston's favor. It is manifest that that book was stolen because it could not be tampered with, and if presumption is to be indulged in, it is that if the book had been produced it would have shown that the oil did not exist. See Grace's evidence, p. 25, and Walker's evidence, p. 48, of respondent's factum. But apart from this, let us examine closely Ruston's story. He says that when he took the warehouse order he visited the store and saw the oil—that is, he saw a quantity of oil piled up in barrels which he did not count; but he adds: "I had three barrels gauged, to test the quantity, by Middleton's storeman, named Grace, I think." He thought rightly. Middleton's storeman was named Grace, and he has been examined as to this visit of Mr. Ruston, and he remembers nothing about it. He remembers seeing him in spring, not later. Further cross-examined if he could not have been there without being seen by Grace, the witness says it is possible, but not likely: "He could not have transacted business there without my knowing it." I presume gauging three barrels there would have been transacting business there. Yet this is Ruston's circumstantial story. Asked further, "What particular brand did you have so gauged?" Ans. "The Atlantic and several other brands, at various times." Equivocation on equivocation. This man's story is all the evidence we have of the existence of the oil, nearly two months before the fire. But let us now come to the evidence on the other side. Grace tells us that "Middleton had no oil, Atlantic brand, in shed No. 1, during the months of May, June, July and August, 1876," as shown by the memo. book. He denies that Middleton ever purchased oil in store from third parties, or if he did, no transfer was sent to witness; and that this was against practice, for that the transfer of all sales was sent to him. It is fair to

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say that when Grace says Middleton had no oil, Atlantic brand, in May, June, July and August, he probably means he received none, else his evidence alone would be conclusive. He also swears that no oil, Atlantic brand, came by canal to Middleton that year. We find, therefore, no receipts by Middleton of oil of this brand during the months named, and no transfer, at all events, of any purchase of oil in store.

Now let us make another calculation. Grace says there were at least 1,500 barrels of Atlantic brand in shed No. 1 at the fire. The most that was in the shed was 2745 barrels. It stood in the names of Archer Labelle, J. L. Cassidy and D. Morrice & Co. There were deliveries, but to what extent Grace cannot say. His evidence, then, is only approximative as to there being only 1,500 barrels at the time of the fire. But we find that Archer Labelle lost 340 barrels by the fire, D. Morrice & Co. 116, Cassidy cannot say how many. It seems he might have had 1,000 barrels. This would have met Grace's calculation, and would have been very decisive if it had been proved exactly. But in the absence of this exact evidence, we have only Grace's memory to trust to, in order to establish that all the oil, Atlantic brand, in shed No. 1 stood in the names of these three parties, and that the quantity was about 1,500 barrels. This is not, of course, as conclusive as could be desired, but, at any rate, it does not contradict Grace's story.

Again, if we take McIntyre's statement, we find that Middleton had no Atlantic brand anywhere on the 30th April, 1867, and only 398 barrels of any kind, instead of 1398. He received in May 699 barrels; in June 405, in July 1100; none in August? There were, therefore, 2602 barrels; we know not what brand. He sold in May, 586 barrels; in June, 1070 barrels; in July, 986 barrels; in August (before the fire), 98 barrels; in all 2740 barrels, or 138 barrels more than he owned of all sorts. This does not seem to include the oil pretended to be bought by Ruston. The evidence here is not, however, clear, and we must say again that, taken by itself, it is not conclusive. But if we take the fact McIntyre positively swears to, that Middleton had no Atlantic brand at the end of April, and the fact that he received none in May, June, July or August, the fact Grace positively swears to, it is evident that he could not have had 480 barrels to sell to Ruston on the 5th June. To this we may add he had no oil on consignment.

Now, let us look at the case in another way. We have already spoken of the disappearance of the general receipt and delivery book. We have also noticed the falsification of the stock book by the addition of 1000 barrels to Middleton's own name. We have, moreover, the evidently falsified marginal entries of the warehouse receipts after the fire. The receipt in question in this case appears to be No. 153, and it is dated 5th June. In the storage book No. 153 is dated 10th May. Again, the scroll of the warehouse receipt does not fit the scroll of the warehouse receipt book. The body of the receipt is in Walker's hand writing, the so-called corresponding entry is in the handwriting of another clerk, Graham. Walker cannot explain this but by saying he supposes he wrote the body of the receipt to Middleton's dictation. The figures also of the number of the warehouse receipt were first written in pencil and written over in ink. Why should

this be done if the warehouse receipt had issued regularly? Then we have McIntyre's evidence that he "cooked up this account of Ruston's about the same time that he falsified Middleton's account."

It was evidently the business of the insured to prove that the object insured was destroyed by fire, and therefore that it existed. This is readily presumed where the party has personal knowledge and makes the preliminary proofs. But can Ruston's evidence sustain this, contradicted as he is by Grace as to his visit to the shed? Again, if this be got over, has not his evidence been annihilated by the evidence of the non-existence of any oil of Atlantic brand, either the property of, or under the control of Middleton? I think, therefore, the judgment has to be confirmed, altering the motive of the judgment in the Court below, in which I cannot concur, on the ground that the evidence establishes that the object insured did not exist in shed No. 1, at the time of the fire.

Some objections were made at enquête to part of the evidence, which appear to be founded, at least in part; but, leaving all the doubtful or bad evidence aside, I think the respondent's case is made out.

The judgment was worded as follows:

"The Court * * * considering that the appellant has failed to establish that the 480 barrels of Atlantic oil insured by the Insurance Policy issued by the Company, respondent, and mentioned in the pleadings in this cause were, as alleged, in the shed No. 1 of William Middleton & Co. at the time of the fire which destroyed the said shed, and that he has failed to prove the loss alleged in his declaration."

"And considering that there is no error in the judgment rendered by the Superior Court at Montreal on the 31st day of October, 1876;"

"This Court, for the above reasons, and not for those in the said judgment given, doth confirm the said judgment of the 31st day of October, 1876, and doth condemn the appellant to pay to the respondents the costs incurred in the Superior Court and on the present appeal."

Judgment of S. C. confirmed.

Abbott & Co., for appellant.
Edward Carter, Q. C., for respondent.
(S. B.)

SUPERIOR COURT, 1880.

MONTREAL, 26TH JANUARY, 1880.

Coram TORRANCE, J.

No. 1563.

Hughes vs. *Rees.*

HELD:—That a defendant who has been foreclosed from pleading, has no right to inscribe the case for enquête *ex parte*.

The defendant had been duly foreclosed from pleading to the action. Afterwards he inscribed for enquête *ex parte*.

Hughes vs. Rose.

The plaintiff moved to reject the inscription, on the ground that he alone as *dominus litis*, could inscribe.

PER CURIAM. In a contested case either party may inscribe for enquête;—C. C. P. 234. By C. C. P. 317, the plaintiff, after obtaining a foreclosure against the defendant, may inscribe for enquête *ex parte*. No such right is given to the defendant, who has allowed the plaintiff to proceed *ex parte* by failing to plead. I have never known of such proceeding by a defendant, and none of my brother judges have known of it. The motion of the plaintiff is, therefore, granted, and the inscription by defendant rejected.

W. H. Kerr, Q. C., for plaintiff.
W. W. Robertson, for defendant.
(J. K.)

Motion granted.

COURT OF REVIEW, 1879.

MONTREAL, 9TH JULY, 1879.

Coram JOHNSON, J., TORRANCE, J., RAINVILLE, J.

No. 1083.

Gerard vs. *Lemire* dit *Marsolais*, & *Gerard*, plaintiff *en dés.* vs. *St. Pierre* et al., defendants *en dés.*

HELD:—That the effect of reconciliation between husband and wife is to extinguish an action *en séparation de corps* pending between them, and, consequently, the plaintiff's attorneys could not legally continue the proceedings to recover their own costs.

TORRANCE, J. The plaintiff had taken out an action *in formâ pauperis* for a separation from bed and board against her husband. On the 15th November the defendant was foreclosed from pleading, and immediately an inscription for *enquête ex parte* was filed for the 18th November.

On the 16th November the defendant gave notice to the attorneys of the plaintiff of a motion to reject the inscription on the ground that the parties were reconciled, and this motion was supported by the affidavit of plaintiff and defendant. The motion was rejected, and a new inscription was made by the plaintiff's attorneys for the 4th January. Thereupon the plaintiff began an action *en désaveu* against her attorneys. This action was maintained by judgment of the Court (Mackay, J.) on the 20th February last. This judgment is now under review. The defendants *en désaveu* contend that the action of disavowal is unfounded: 1st. Because they had a right to continue the action for their costs against the defendant. 2nd. Because the only proceeding which the plaintiff could take against her attorneys was to revoke their mandate conformably to C. C. P. 205, namely, by paying their costs. On the other hand, the plaintiff has invoked C. C. 196, by which a reconciliation between husband and wife has the effect of extinguishing the action. The Court took this view, and regarding the reconciliation with the utmost favor, it is impossible for us to take a different view from the Court whose judgment is under review. The judgment will, therefore, be confirmed.

H. B. Rainville, for plaintiff *en dés.*
St. Pierre & Scanlan, for defendants *en dés.*
(S. B.)

Judgment of S. C. confirmed.

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 16TH SEPTEMBER, 1879.

Coram SIR A. A. DORION, C.J., MONK, RAMSAY, TESSIER & CROSS, JJ.

No. 37.

THOMAS F. O'BRIEN,

(*Plaintiff in the Court below,*)

AND APPELLANT;

F. WOLFERSTAN THOMAS,

(*Defendant in the Court below,*)

RESPONDENT.

HELD :—1. That judicial admissions cannot be divided against the party making them.
2. That a contract for a lawful consideration is not the less valid though the consideration be incorrectly expressed therein.

The judgment appealed from was rendered by the Superior Court, Montreal, TORRANCE, J., 7th November, 1877, dismissing the appellant's action.

The case in the Court below will be found reported in 21 L. C. Jurist, p. 287.

SIR A. A. DORION, C. J. On the 30th of December, 1873, the appellant sold to the respondent several lots of land for the sum of $2,400, which, by the deed of sale, he acknowledged to have received in cash at the passing of the deed.

On the 11th of September, 1877, nearly four years after the sale, the appellant, alleging that the respondent never paid the price of sale, instituted this action, by which he claims from him the sum of $2,400 and interest from date of sale.

The respondent answered, that it is true that he did not pay the price of sale in cash; but that the appellant had previously agreed to purchase some property and to give him an interest in the purchase; that he subsequently refused to do so, and to indemnify the respondent he gave him the lots of lands mentioned in the deed of the 30th of December, 1873, and gave him a discharge for the price, although the consideration was as above stated.

The respondent, on being examined as a witness, states the transaction to have been that mentioned in his plea.

The Court below dismissed the action.

The appellant contends that, having proved by the respondent that he had not paid the price mentioned in the deed, he ought to recover the amount demanded, inasmuch as the respondent could not make evidence in his own favour, and that his answers ought to be divided.

We have already decided in the case of Fulton & McNamee (2 Supreme Court Reports, p. 470) that the answers of a defendant are not divisible, except in certain exceptional cases, and this applies to answers made by a party examined

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as a witness, as well as to answers upon *faits et articles*; in fact, it applies to all admissions.—(Art. 1243 C. C.)

It is also a well-recognized doctrine, that, unless the law expressly requires it, it is not necessary to express in the deed the cause or consideration of an obligation or of a contract, and as a consequence of this rule, it follows that a contract is not vitiated although the cause or consideration therein expressed be false, provided there was a legitimate cause for it, notwithstanding that it may differ or be inconsistent with the one expressed.

Larombière, Vol. 1, Art. 1132, No. 8, says on this point: "De ce qu'il n'est "pas nécessaire pour la validité du contrat d'exprimer la cause de l'obligation, "il résulte qu'il n'est pas moins valable, quoique la cause exprimée soit fausse, "si d'ailleurs il est établi qu'il en existe une sincère et légitime."

. . . . . .

"Il arrive le plus souvent que les mêmes éléments juridiques de preuve qui "établissent la fausseté de la cause exprimée concourent à démontrer, en même "temps, l'existence d'une autre cause non écrite. Les juges ne peuvent dès "lors, en admettant la preuve qui établit la fausseté de la cause, rejeter celle "qui justifie la réalité d'une autre cause licite. Une pareille division des "éléments de preuve est contraire au principe de l'indivisibilité des preuves "légales."

Demolombe, T. 1, des Contrats, No. 373, also says:—"Il peut, du reste, "arriver que les deux circonstances de la fausseté de la cause exprimée, et "de l'existence d'une autre cause véritable, se trouvent demontrées à la fois "par la même preuve; et dans ce cas, cette preuve unique et indivisible les "démontre, en effet, du même coup, toutes les deux."

See also Merlin Rep. vo. cause des obligations, § 1, No. 3, et Sirey, 1855, 1, 751.

This rule was acted upon in the cases of Holland & Wilson, 1 L. C. Rep. 60, and in Lefebvre & DeMontigny, 2 L. C. Jurist, 79, and it is so universally admitted by the authors that it seems it ought not to create any more difficulty in its application.

The judgment of the Court below must therefore be confirmed.*

J. L. Morris, for appellant. Judgment confirmed.

Abbott, Tait, Wotherspoon & Abbott, for respondent.

(J. K.)

* A similar judgment was rendered on the same day in the case No. 38, O'Brien, appellant, and Molson, respondent. (Reporter's note.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 16TH SEPTEMBER, 1879.

Coram SIR A. A. DORION, C. J., MONK, RAMSAY, TESSIER, CROSS, JJ.

No. 8.

LA COMPAGNIE DE PRET ET CREDIT FONCIER,

(Plaintiff in the Court below,)

APPELLANT;

AND

BAKER ET AL.,

(Adjudicataires, petitioners below,)

RESPONDENTS.

HELD:—1. That where a lot of land sold at sheriff's sale was described in the minutes of seizure and in the advertisements, as having a two-story wooden house thereon erected, while in fact the house in question was erected partly on the lot sold and partly on the adjoining lot, and it was proved, moreover, that the purchaser would not have bought if he had been aware of the error, the sale will be vacated at the suit of the purchaser on the ground of misdescription.

2. That an error in the minutes of seizure as to the contents of an immoveable bearing a cadastral number will not alone support a demand by the purchaser to have the sale vacated on the ground of misdescription, even where a lot only 30 feet frontage was described as of 45 feet frontage.

The judgment appealed from was rendered by the Superior Court, Montreal, JOHNSON, J., as follows:—

"The Court, having heard the petitioners and the plaintiffs contesting by their attorneys upon the merits of the petition made and filed by petitioners *ès qualité, en nullité de décret*, of the following immoveable, to wit: 'Un terrain situé au village Delisle, paroisse de Ste. Cunégonde, ci-devant de la paroisse de Montréal, portant le numéro 620 sur le plan et dans le livre de renvoi officiels de la municipalité de la paroisse de Montréal, contenant quarante-cinq pieds de front sur quatre-vingt pieds de profondeur, avec une maison en bois à deux étages et autres dépendances dessus construites, et borné en front par la rue Workman,' sold and adjudicated by the Sheriff of this District to William Workman and Alexandre Maurice Delisle, under and in virtue of the writ of execution issued in this cause, on the 21st day of June, 1877, having examined the proceedings, the evidence, and deliberated:

"Considering that the said petitioners *en nullité de décret* have proved the allegations of their petition, and that under the first notice of sale given in this cause, the said sheriff cannot give them more than the thing sold, that is to say lot 620, and that there was essential misdescription in saying that the house mentioned in the notice was on lot 620;

"Considering therefore that petitioners have good ground for their requête, the same is maintained, but considering that they were the original vendors as well as the *adjudicataires*, it is maintained without costs;

"The Court doth in consequence declare the said *décret* of the second November last to be null and of no effect, and order that the said sheriff, or his representatives, do return and give back to the said petitioners the purchase price of the said immoveable, to wit, $1300, or any other obligation given by the said *adjudicataires* Workman and Delisle to said sheriff in *lieu* of the said sum."

La Compagnie de Prêt et Crédit Foncier and Baker et al.

SIR A. A. DORION, C. J. Messieurs Workman et Delisle ont acheté à une vente faite par le shérif, sur un nommé Laurent Peladeau, à la poursuite de la compagnie appelante, une propriété désignée dans le procès verbal de saisie et dans les annonces comme suit: "Un terrain situé au village Delisle, paroisse de "Ste. Cunégonde, ci-devant paroisse de Montréal, portant le numéro six cent "vingt (620) sur le plan et dans le livre de renvoi officiels de la municipalité de "la paroisse de Montréal, contenant 45 pieds de front, sur 80 pieds de profon- "deur, avec une maison en bois, à deux étages et autres dépendances dessus "construites et borné en front par la rue Workman."

Après avoir payé au shérif le prix d'adjudication, les représentants de M. Workman et M. Delisle, intimés en cette cause, ont présenté une requête en nullité de décret, alléguant que le lot de terre qui leur avait été vendu n'avait que trente pieds de front au lieu de quarante cinq, et que la maison indiquée dans les annonces au lieu d'être en entier sur le terrain vendu, était en partie construite sur le lot voisin, et qu'ils n'auraient pas acheté la propriété s'ils avaient connu ces faits. Ils concluaient à ce que la vente soit annulée et que le shérif soit tenue de leur remettre le prix qu'ils ont payé.

L'appelante a répondu que Messieurs Delisle et Workman avaient eux-mêmes vendu à Peladeau le terrain désigné sous le numéro 620, et qu'ils ne pouvaient se plaindre des erreurs dans la désignation de la propriété, vu que les ventes par le shérif sont toujours faites sans garantie quant à la contenance, et qu'il y avait une condition expresse à cet effet dans les annonces du shérif.

Il a été prouvé que le lot No. 620 a été vendu à Peladeau par Messieurs Delisle et Workman; que ce terrain ne contient que trente pieds de front; que Peladeau a depuis construit sur ce lot et sur le lot voisin une maison de trente sept pieds de front dont une partie couvrant un espace de vingt deux pieds de front se trouve sur le lot No. 620, et quinze pieds sur le lot No. 621; que les bâtiments sont également partie sur un des lots et partie sur l'autre; que l'agent des Messieurs Delisle et Workman et tous ceux qui étaient à la vente étaient sous l'impression que le lot vendu avait réellement quarante cinq pieds de front et comprenait toute la maison et les bâtisses qui sont sur les deux lots.

Sur cette preuve la Cour Inférieure a accordé aux intimés les conclusions de leur requête.

L'appelante invoque à l'encontre du jugement rendu par la Cour Supérieur l'Art. 708 du Code de Procédure Civile, qui décrète, que: "l'adjudica- "tion est toujours sans garantie quant à la contenance de l'immeuble," et le jugement prononcé dans la cause du Séminaire de Québec et Douglas, (3 Rap. Jud. de Québec 197) confirmé en appel.

S'il ne s'agissait ici que de la contenance de l'immeuble vendu nous jugerions comme nous l'avons fait dans la cause du Séminaire et Douglas, et conformément à l'article 708, que l'adjudicataire n'a pas de garantie et qu'il n'a pas droit à une diminution de prix à raison du défaut de contenance de l'immeuble acheté à une vente faite par le shérif; mais nous n'avons pas décidé dans cette cause-là, que si un adjudicataire achète un terrain bâti de maison, et que la maison soit sur le lot voisin, il est obligé de se contenter d'un lot vacant au lieu d'un terrain avec une maison. Ce n'est pas l'article 708 de Code de Procédure qui est appliquable dans ce cas, mais le 3e alinéa du § 2 de l'art. 714.

dét art. dit: " Le décret peut être déclaré nul:

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2o. " A la poursuite de l'adjudicataire * * * * * *. Si l'immeuble est tellement différent de la description qui en est donnée dans le procès verbal de saisie qu'il est à présumer que l'adjudicataire n'aurait pas acheté s'il eût connu cette différence."

Dans l'espèce non-seulement il est à présumer, mais il est clairement prouvé que les adjudicataires n'auraient pas acheté s'ils avaient cru que l'on ne vendait que les cinq septièmes d'une maison et des bâtiments dont la totalité était indiquée dans les annonces comme devant faire partie de la vente.

Il ne s'agit pas ici de deux corps de bâtiments dont l'un serait sur le terrain adjugé aux intimés pourrait leur être attribué, tout en laissant l'autre au propriétaire du terrain voisin, il n'y a réellement qu'une seule maison et un seul corps de bâtiments, et les intimés seraient obligés de les démolir et refaire en partie pour jouir de ce qui se trouve sur le No. 620 qu'ils ont acheté.

Il est certain que les adjudicataires n'ont pas comme dans le cas d'une vente par *aversionem*, ce qu'ils entendaient acheter, et qu'ils doivent être relevés de leur adjudication.

Les appelants ont soulevé dans leur factum l'objection que la requête en nullité de décret n'a pas été signifiée au défendeur, Peladeau, sur qui la vente a été faite. Sans exprimer d'opinion sur la valeur de cette objection si elle avait été faite en Cour Inférieure, nous croyons qu'il est trop tard, en appel, pour la faire valoir.

Judgment confirmed.

M. E. Charpentier, for appellant.
Barnard & Monk, for respondent.
(J. K.)

COURT OF REVIEW, 1879.

MONTREAL, 30TH JUNE, 1879.

Coram RAINVILLE, J., PAPINEAU, J., JETTÉ, J.

No. 1904.

Rhicard vs. *Chicoine.*

HELD:—That an action en *réintégrande* cannot be sustained when the plaintiff, by his pleadings, admits that his possession was originally precarious, and fails to establish by legal evidence that the nature of that possession became converted into that of a usufructuary, as alleged in his pleadings.

This was a review of a judgment rendered by the Superior Court of the District of Bedford, (DUNKIN, J.) which dismissed the plaintiff's action.

RAINVILLE, J.:—Le demandeur se pourvoit en révision d'un jugement de la Cour Supérieure du District de Bedford, lequel l'a débouté de son action.

La poursuite du demandeur est une action pure et simple en réintégrande: il allègue sa possession publique et ouverte à titre de propriétaire de l'héritage en question pendant plus d'un an et un jour et sa dépossession par violence par le défendeur, et il prend les conclusions ordinaires.

A cette action le défendeur a plaidé que le 29 juillet 1845, un nommé Alvin

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Cheney vendit à Jacob Rhicard, l'un des fils du demandeur, l'immeuble en question : que le dit Jacob Richard permit à son père, le demandeur, de vivre sur la dite propriété et d'en percevoir les fruits : qu'en 1868 Jacob Rhicard est mort, laissant pour ses représentants légaux ses deux fils, Mixer et Charles, qui sont devenus propriétaires par indivis de la moitié du dit immeuble conjointement avec leur mère, qui est devenu propriétaire de l'autre moitié comme commune en biens ; qu'en mars 1871 ces deux fils et leur mère consentirent une promesse de vente au défendeur moyennant considération dont $100.00 payées comptant ; que cette promesse de vente a été duement enregistrée, et qu'en vertu d'icelle le défendeur s'est mis en possession du dit immeuble ; que le demandeur n'a jamais eu qu'un titre précaire et qu'il est sans droit pour intenter l'action en réintégrande.

A cette exception le demandeur a répondu spécialement, admettant n'avoir été en possession que par simple tolérance de son fils Jacob, depuis 1846 jusqu'en 1856, qu'à cette dernière époque Jacob Rhicard aurait vendu le dit immeuble par acte sous seing privé à ses deux frères, Mark, jr., et Jeremiah, et que ces derniers lui auraient donné à lui demandeur, sa vie durant, l'usufruit et jouissance de l'immeuble en question, et que comme tel il possédait à titre de propriétaire.

Le demandeur admet donc avoir commencé à posséder à titre précaire, et il a possédé comme tel pendant dix ans suivant son admission. Or il est de principe que quand on a commencé à posséder pour autrui, ou à titre précaire, on est toujours présumé posséder au même titre s'il n'y a *preuve du contraire*.

C. C. B. C. art. 2195.

Et l'art. 2208 ajoute qu'on ne peut pas se changer à soi-même la cause ni le principe de sa possession si ce n'est par interversion. La première cause d'interversion, indiquée par tous les auteurs, est une possession nouvelle commencée à l'ombre d'un titre émané d'un tiers.

" Il y a fait d'un tiers, dit Troplong, lorsque le propriétaire qui a donné la " possession précaire convertit cette possession en une possession *animo domini*. " Par ex. : si le bailleur vend au fermier le bien que ce dernier possédait " comme bailliste, il est évident que le fait de cet achat le rend possesseur légi- " time, et qu'il commence dès lors à posséder pour lui-même.

Tropl. Presc. sur l'art. 2239.

Mais comment se prouvera cette interversion ? Il faudra que le demandeur produise un titre afin que la Cour puisse apprécier le caractère de sa nouvelle possession.

19 Laurent No. 424, p. 449. Miroy, act. poss. sect. 8, p. 39 & s.
Cremieu Id., p. 449, No. 409.
Carou Id., p. 486, No. 734.
Bourbeau, vol. 7, No. 425 & s.

Le demandeur invoque la vente sous seing privé par son fils Jacob à ses frères Mark, jr., et Jeremiah. Mais il n'y a aucune preuve de telle vente : le demandeur doit donc succomber, et le jugement doit, en conséquence, être confirmé en changeant les motifs.

The following was the written judgment of the Court :

"La Cour * * * considérant que le demandeur, après avoir allégué dans son action qu'il était en possession, *animo domini*, depuis plus de vingt ans avant le premier de mai 1876, a admis par ses réponses que sa possession depuis 1846 ou 1847 n'était qu'une possession précaire qu'il tenait de son fils Jacob Rhicard, et pour ce dernier alors propriétaire de l'immeuble en question.

"Considérant que le demandeur allègue de plus par sa réponse à l'exception et défense du défendeur que depuis 1856 jusqu'au temps de son action il a possédé à titre d'usufruitier, qu'il tenait des nommés Mark et Jeremiah Rhicard, deux de ses fils, et qu'il n'a pas justifié cet allégué.

"Considérant que son allégation de possession *animo domini* et le droit d'action qu'il basait sur cette possession sont détruits par sa réponse à la défense, et que son allégation de possession à titre d'usufruitier n'est contenue que dans sa réponse, et non dans son action, et ne peut servir de base à celle-ci et n'est pas prouvée;

"Considérant que le demandeur allègue avoir commencé à posséder à titre précaire et avoir ensuite possédé depuis 1856 à titre d'usufruitier, mais qu'il n'a pas prouvé l'interversion de titre de sa possession;

"Considérant que l'action du demandeur n'étant appuyée, ni sur l'une ni sur l'autre possession, elle est sans fondement, et qu'elle a été justement déboutée;

"Cette Cour, pour les motifs ci-dessus énoncés, confirme en certains points le jugement prononcé, &c."

Judgment of S. C. confirmed.

Bethune & Bethune, for plaintiff.
Ernest Racicot, for defendant.
(S. B.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 14TH JUNE, 1879.

Coram HON. SIR A. A. DORION, Ch. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 48.

HAMILTON, APPELLANT;

AND

WALL, RESPONDENT.

HELD:—That the following clause in a deed of sale of real property creates a servitude *non ædificandi*, in favor of the vendor's neighbouring property: "Il est encore entendu que toute bâtisse qu'érigera le dit acquéreur sur le dit terrein, sera en ligne avec celle du dit vendeur." And, that a subsequent purchaser of the property is thereby prevented from building beyond the said line. And, should he so build, the Court will order the demolition of that part of the building projecting beyond said line.

The facts that gave rise to the present appeal are the following:—

By deed of sale executed 5th April, 1875, the appellant sold a property in the St. Antoine Suburbs of this city to one Jean Bte. Perrault.

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After the usual covenants conveying the property, the deed contained the following clause:—

"Cette vente, cession, transport et déhissement ainsi fait, aux charges, servitudes, clauses et conditions qui suivent, aux quelles le dit acquéreur ses hoirs et ayant cause seront tenus, savoir:

1. De contribuer pour sa quote part avec toutes les autres personnes qui ont droit de passage en icelles, aux frais nécessaires pour tenir les dites deux ruelles nettes et en bon ordre.

2. De payer le coût des présentes et d'une copie d'icelles pour le dit vendeur."

Then followed the usual clause providing for the payment of the purchase money, which was succeeded by the following clause:—

"Il est expressément convenu entre les dites parties qu'il ne sera construit sur "le dit terrain aucune boucherie, tannerie, manufacture de savon ou d'huile ou "bâtisse pour en magasiner de l'huile, ou aucune manufacture ou boutique quel- "conque, et que le terrain sus-dit ne sera employé pour y tenir un clos de bois, "de pierre ou brique, ni à aucune usage quelconque qui puisse être considéré "une nuisance pour le vendeur; cette clause est de rigeur et non comminatoire."

Then came the following clause:—

"Il est encore entendu que toute bâtisse qu'érigera le dit acquéreur sur le dit "terrein, sera en ligne avec celle du dit vendeur."

The respondent, having purchased from Perrault the property acquired by him under the said deed, commenced the erection of a dwelling house thereon, on a line 12 feet 6 inches in front of the line on which the appellant had previously erected a house on his adjoining property. The appellant thereupon sued the respondent in the Superior Court here, contending by his declaration that under the clause in the deed to Perrault last above recited a servitude was created on the property sold by that deed, prohibiting the erection of any building on that part of the property lying in front of a line drawn in prolongation with the front of appellant's said house, and asking that the respondent be ordered to demolish the house he had so commenced to erect, and, in default, that the appellant be allowed to do so at respondent's expense.

The respondent, by his plea, admitted that the house he erected projected 12 feet 6 inches beyond the line of the front of appellant's house, but contended that what he had done was done in the exercise of his legal rights as the owner and proprietor of the said lot of land on which he so erected the said dwelling house, and that he was not and is not bound by law to erect said dwelling house on the same line as the plaintiff had so built his said house on the property immediately adjoining said lot of land.

The case was heard before the Hon. Mr. Justice PAPINEAU, who rendered judgment on the 30th November, 1877, dismissing the appellant's action, assigning the following reasons in his written judgment:—

"Considérant que le titre du demandeur n'établit pas d'une manière satisfaisante en faveur de son terrain, étant, &c. * * * le droit de servitude qu'il réclame sur le lot voisin, étant, &c. * * * Considérant que le demandeur n'a pas établi, contre le défendeur, le droit d'action qu'il cherche à faire valoir par sa présente demande."

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Wurtele, Q.C., for appellant:—

Conventional servitudes are established by contracts of different kinds, and no express form of words is required. (1) The essentials are:—that it appears clearly that the stipulation is not a personal obligation, but a charge imposed on one property for the benefit of another belonging to a different proprietor; and that the nature of the servitude be clearly shown and defined. (2) Pardessus, in his Treatise on Servitudes, and Pothier, in his work on the Custom of Orleans, (3) say that one way to establish a servitude is by a clause in a deed of sale by which the seller reserves or imposes a servitude upon the land he sells in favor of another property retained by himself; and this is the case in the present instance. Pardessus (4) expressly states that a servitude should be designated so as to leave no doubt as to the land in favor of which it is established, or as to the land charged with it, and as to the nature of the charge; and that uncertainty on these three heads would destroy the stipulation from the impossibility of knowing the intention of the parties, but if the title contains these three essentials that it is the duty of the Courts to give effect to the servitude.

If there is any doubt as to the object of the servitude, or as to the existence of the servient land or the identity of the dominant land, the title is without effect, and a servitude cannot be judicially recognized; but Solon, in his Treatise on Servitudes, (5) tells us that such a title to be doubtful must be one from which it is impossible to ascertain the object and extent of the servitude, and that a deed in the matter of servitudes must have full effect, whatever may be its imperfections, whenever the intention of the parties can be ascertained. Toullier (6) writes that where the grant declares that it has been made for the utility of another property, there can be no doubt that it is a servitude and not a personal obligation which has been created, although the word servitude be not used. He adds that where a deed conferring a right does not declare that it has been conceded for the utility of another property but in favor of the owner of such property, the question is whether from its nature the right conceded confers a real utility to the property or only a personal enjoyment to the individual; he asserts that in the first case the right conferred is a servitude, and that, on the contrary, in the other case where the right granted only confers a certain personal enjoyment, such as the right to walk in a garden, to pick fruit or flowers, it is simply a personal obligation.

Now, if we apply these rules to the present case, it results beyond question

(1) Pothier, Coutume d'Orleans, Titre 13, No. 10.
Lalaure, Servitudes Réelles, Page 53.
(2) Goupy, sur Desgodets, Page 433, note b.
Lalaure, Servitudes Réelles, Page 240.
Pardessus, Servitudes, No. 232.
Solon, Servitudes, Nos. 373 & 374.
Demolombe, 2 Servitudes, Nos. 729, 730 & 731.
(3) Pothier, Coutume d'Orléans, Titre 13, No. 10.
Pardessus, Servitudes, No. 234.
(4) Pardessus, Servitudes, No. 234.
(5) Solon, Servitudes, No. 374.
(6) 3 Toullier, No. 588.

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that a servitude was established over subdivision L in favor of subdivision M of No. 645. The stipulation is a reservation contained in the deed of sale of subdivision L, made by the vendor, who was and remained the owner of the adjoining subdivision M; there is no ambiguity as to the existence of the servient land or as to the identity of the dominant land, and the extent of the charge is clearly defined,—not to build in front of the line on which the vendor had previously built; and the stipulation is one for the utility of the vendor's adjoining property and not merely for his own personal enjoyment.

Solon, in another place, (7) tells us that the prohibition to build in front of a house made without condition or limitation by the seller, who remains proprietor of the house indicated, is a servitude; and Demolombe (8) says that the servitude *non ædificandi* which prohibits the proprietor of the servient land from building is generally established in order to give the dominant land better light, a more agreeable aspect and the advantages which result from greater abundance of air and light. Duranton (9) also states that this servitude is generally established to give the dominant land a better look-out or a more agreeable aspect; and that the extent of land covered by it is to be determined by the title. These authorities show clearly, from the object which the appellant must have had in view in making the stipulation quoted, that it was the intention of the parties to create a servitude in favor of his adjoining property and not a personal obligation in his favor. Besides this question seems settled by the arrêt reported by Sirey, in the vol. of 1825, Pt. 1, p. 29.

As a general rule, an assign is not held by promises made by his author respecting the property transmitted, but by exception this rule does not apply to promises which impose a right of servitude. The assign takes the property with the right of enforcing all servitudes in its favor, but subject at the same time to such as may have been imposed upon it; and Demolombe (10) states this in express words. But besides this principle, there is in the present case the personal undertaking of the respondent to comply with all the prohibitions and restrictions contained in the deed of sale from the appellant to Mr. Perrault; and he consequently, as explained by Desgodets, (11) became and is charged and obliged in the same manner and to the same extent, as his vendor with respect to the prohibition to build in question in this cause.

The appellant confidently maintains that, by the clause or reservation above quoted, a servitude *non ædificandi* was established in a clear and satisfactory manner in favor of his lot subdivision M, over all that part of the neighbouring lot subdivision L between Donegana street and the line on which he had previously built his house, and that there is consequently error in the judgment appealed from.

He therefore prays for the reversal of the judgment rendered in the Court below and for a judgment giving him the conclusions of his declaration, with the exception of the demand for damages which he waived.

(7) Solon, Servitudes, No. 443.
(8) Demolombe, 2 Servitudes, No. 920.
(9) 5 Duranton, Nos. 510 & 514.
(10) Demolombe, 1 Obligations, No. 283.
(11) Goupy sur Desgodets, Page 435, No. 6.

Bethune, Q.C., for respondent:

The servitude claimed to exist in the present instance is a real servitude, and by Art. 499 of our Civil Code a real servitude is defined to be "a charge imposed *on* one real estate for the benefit of another belonging to a different proprietor." And under articles 545 and 549, "no servitude can be established without a title," and its use and extent "are determined according to the title" which constitutes it.

Now, how can it be said that such a casual remark as that contained in the clause of the deed relied on by the appellant, namely, that it was *understood* that any building which *Perrault* might erect on the lot purchased by him should be in a line with that of the vendor, was "a charge *imposed on*" the lot of land itself so acquired by Perrault. The understanding, such as it was, was a mere *personal* one between the parties, and had reference only to such building as might be erected by *Perrault*. There is nothing in the language of the clause itself to justify the statement that the parties thereby *imposed on the lot purchased* a real right of servitude; and it is quite clear, from the language of the preceding clauses in the deed, that no such intention existed in the minds of the parties.

Then, assuming for argument's sake, that by the clause in question the parties really did intend to create a servitude *on the property* so purchased by Perrault, it is submitted that the language used is so vague that it is impossible to determine in a precise manner the real character of such servitude. To use the language of the learned Judge at the rendering of his judgment:—"On se demande naturellement si c'est la ligne, devant, ou derrière, ou en côté. Est-ce en ligne avec la maison qui parait avoir existé alors, ou celle qu'il pourrait y ériger plus tard? Est-ce en ligne avec une autre bâtisse que sa maison? S'il reste du terrain en arrière de la bâtisse du défendeur, ce terrain se trouve-t-il assujetti à la même servitude que le demandeur réclame sur la devanture? Il y a tout autant de raison, d'après les termes de cette clause, de réclamer une servitude sur la partie du terrain située en arrière de la bâtisse qu'en avant. Il n'y a donc pas certitude sur l'étendue de la prétendue servitude, ni sur la partie de la propriété qu'elle doit grever."

Now, the respondent, as the owner of the lot in question, is free to build as he pleases thereon, and can only be restrained from so doing by express convention to the contrary, *affecting the lot itself* and embodied in a title deed. Art. 414 of the Civil Code, and articles already cited. And in case of doubt or uncertainty as to whether or not a servitude has been created on a property, and as to the precise character of such servitude, the well recognized rule of law is, that the convention, such as it is, shall be interpreted in favor of the liberty or freedom of the lot sought to be burdened with the servitude; the right of servitude being an *odious* right and contrary to natural liberty. 2 Bourjon, p. 2, No. 2 of Sec. 1 of Tit. 1; 1st Pardessus, No. 235, p. 547; 2nd Recueil des Arrêts de Lamoignon, p. 81.

It is, moreover, submitted, that the "understanding" in question cannot be elevated to the rank of a convention or contract, and if it be, that it is ineffectual for want of consideration. Art. 989 of the Civil Code, and the maxim of the Civil Law, "*Ex nudo pacto non oritur actio.*"

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On the whole, the respondent respectfully claims the confirmation of the judgment appealed from.

MONK, J., (*dissentiens*) briefly remarked, that he was of opinion, under all the circumstances of the case, that no servitude was really created by the deed in question, and that the judgment complained of ought to be confirmed.

TESSIER, J. Il s'agit de la question d'une servitude réclamée par l'appelant Hamilton, propriétaire d'un terrain situé dans le quartier St. Antoine de la cité de Montréal, contre son voisin Wall à l'effet d'empêcher ce voisin de construire sa maison au delà de la ligne de celle de l'appelant.

Cette servitude reconnue en loi comme servitude *non ædificandi* a été créée par un acte de vente du 5 avril 1875, par l'appelant Hamilton à Jean Bte. G. Perrault, devant McIntosh notaire, dans les termes suivants :

" Il est *encore* entendu que toute bâtisse qu'exigera le dit acquéreur sur le dit " terrain sera en ligne avec celle du vendeur."

A cette époque la maison du vendeur était et est encore à 30 pieds en deça de la ligne de la rue Donegana. Cet acte a été enregistré au long le 7 janvier 1876.

M. Hamilton en démembrant ou divisant son terrain avait bien le droit d'asservir la portion du terrain qu'il vendait envers le terrain qu'il conservait. Subséquemment M. Perreault a vendu le terrain servant à James Wall, l'intimé en cette cause, par un acte du 26 mai 1876, devant Mtre. Labadie, mais M. Perrault a eu le soin de soumettre l'acquéreur M. Wall à cette servitude par la stipulation suivante :

" Furthermore the said purchaser doth hereby bind and promise and oblige " himself, his heirs and assigns, to comply with all and every obligations, *pro-* " *hibitions* and *restrictions* in the deed of sale above cited, of all which he de- " clared to have a perfect knowledge."

Un an après, le 30 juin 1877, Wall l'intimé a commencé à bâtir une maison à 12 pieds 6 pouces de la ligne prolongée sur la maison de l'appelant, au lieu de 30 pieds suivant la ligne de prolongation stipulée dans l'acte primitif. Aussitôt, savoir, le 3 juillet 1877, Hamilton a protesté Wall contre cette empiétation ou infraction au droit de servitude, et le 9 juillet, même mois, l'appelant a porté une action en dénonciation de cette nouvelle œuvre, et en demandant la démolition des ouvrages et la soumission de Wall à la servitude en question.

L'intimé tout en admettant qu'il a ainsi commencé à bâtir sa maison a nié à l'appelant ce droit de servitude. La Cour Supérieure a maintenu cette prétention de M. Wall, et a débouté l'action de l'appelant par un jugement du 30 novembre 1877.

La question s'élève donc : est-ce là une servitude ou une simple obligation personnelle. *Vide art.* 414 *Code Civil.*

Les autorités sont nombreuses sur ce point, et pour n'en citer qu'une seule je réfère à Toullier, 3 volume, No. 588, où la question est clairement discutée.

" Il est donc important de distinguer quand le droit est imposé pour un fonds " ou seulement stipulé en faveur de la personne. Si la concession énonce qu'il " ait concédé pour l'utilité d'un autre fonds, il ne peut y avoir de doute, quand " même le droit ne serait pas qualifié de servitude. Cette qualification n'est pas

" nécessaire, tout service imposé sur un fonds en faveur d'un autre fonds est " essentiellement une servitude. La nature d'un droit se détermine par sa " qualité plutôt que par la dénomination qu'on lui a donnée."

Idém, vide No. 589.

La seconde question c'est de savoir si cette servitude est exprimée d'une manière certaine, précise et suffisante. N'est-elle pas trop vague? Je crois qu'elle est facile à comprendre; cette stipulation est d'usage ordinaire dans les grandes villes. Si cette stipulation veut dire quelque chose, que veut-elle dire? Il faut lui donner le sens le plus raisonnable.

Les actes ont été enrégistrés et à ce point du vue l'intimé ne peut se plaindre de l'ignorance de cette prohibition.

Il est bon d'observer que c'est l'appelant qui a stipulé cette servitude, et même si elle était personnelle à lui-même, elle durerait encore de son vivant, mais il parait évident, dans les termes de Toullier 3 vol. No. 590, " que ce droit " est concédé au fonds toutes les fois qu'il ne peut être exercé que par le posses- " seur du fonds quel qu'il soit, et que ce possesseur perd la faculté de l'exercer " en perdant la possession du fonds."

Ici c'est le possesseur du fonds dominant qui réclame le maintien de cette servitude sur le fonds voisin en faveur de son fonds, et cette Cour par la majorité des juges renverse le jugement et maintient la servitude *non ædificandi* en faveur de l'appelant.

SIR A. A. DORION, CH. J.:—This is an action by the appellant, who claims a servitude, *non ædificandi*, on a lot of land belonging to the respondent, and which joins his own land. By the conclusions of his declaration the appellant asks that the respondent be ordered to remove the house he has commenced to erect, and to restore the land in the state it was when he commenced his building.

On the 5th of April, 1875, the appellant sold to one Jean Baptiste G. Perrault a lot of land, in the city of Montreal, which is bounded to the south-west by another lot of land belonging to the appellant.

The deed of sale, which was duly registered on the 7th of January, 1876, contains the following condition:

" Il est entendu que toute bâtisse qu'érigera le dit acquéreur sur le dit terrain " sera en ligne avec celle du dit vendeur."

There was, then, on the lot retained by the appellant, a brick dwelling-house standing at about thirty feet from the line of Donegana street.

On the 20th of May, 1876, Perrault sold to the respondent the lot of land he had purchased from the appellant. The deed of sale contains, among others, the following stipulation:

" Furthermore the said purchaser (the respondent) doth hereby promise, " bind and oblige himself, his heirs and assigns, to comply with all and every " obligations, prohibitions and restrictions in the deed of sale first above cited, " (the deed from appellant to Perrault) of all which he declared to have a perfect " knowledge."

Subsequently the respondent commenced building a house on the lot of land so purchased from Perrault, and he placed this house on a line about twelve feet

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six inches beyond the front line of the appellant's house, that is twelve feet six inches nearer the street.

The appellant, after serving a protest on the respondent, requesting him to discontinue his works, has instituted this action.

The respondent admits by his plea that he has placed his house twelve feet six inches beyond the front line of that of the appellant, and he claims that, being the owner of the lot of land on which he has built it, he had a right to do so, and was not obliged to place it in a line with the appellant's house.

The Superior Court held that the appellant had not established that he had a right to the servitude which he claimed on respondent's lot of land, and dismissed his action.

The question we have to determine is whether the clause in the deed of the 5th of April, 1875, by which Perrault agreed not to build except on a line with that of the appellant's house, has created a servitude on the lot of land now belonging to the respondent, or whether it was a mere personal obligation on the part of Perrault in favor of the appellant, which did not attach to the property sold.

According to the Civil Code, Art. 499, "A servitude is a charge imposed "upon one property for the benefit of another."

When the charge is designated in the deed as being a servitude, or when it is declared to be for the benefit of a property belonging to another, there can be no difficulty that it is a servitude.

When, however, the character of the charge is not sufficiently indicated by the deed, it must be determined by the nature of the obligation, and if, from the circumstances, the obligation appears to have been stipulated for the personal advantage of the creditor, without reference to his property, it will be considered as a personal right, and will not follow his property, although it may follow that upon which it is imposed according to the conditions of the stipulation. If, on the contrary, the charge is either necessary to the enjoyment of the property of the obligee, or confers upon it some substantial advantage sufficient to indicate that it was for the property and not for the person of the creditor that it was imposed, then it will be considered as a real servitude created on the property of the obligor in favor of that of the obligee and following the two properties in whatever hands they may pass.

Toullier, vol. 3, No. 588, says:—

"Il est donc encore aujourd'hui important de distinguer quand le droit est imposé pour un fonds ou seulement stipulé en faveur de la personne.

Si la concession énonce qu'il est concédé pour l'utilité d'un autre fonds, il ne peut y avoir de doute, quand même le droit ne serait pas qualifié de servitude. Cette qualification n'est pas nécessaire, tout service imposé sur un fonds en faveur d'un autre fonds, est essentiellement une servitude. La nature d'un droit se détermine par sa qualité plutôt que par la dénomination qu'on lui a donnée.

Si l'acte n'énonçait pas que ce droit est concédé pour l'utilité de tel héritage, mais en faveur de telle personne qui en est propriétaire, il faudrait considérer si, par sa nature, le droit concédé procure une utilité réelle à l'héritage, ou seulement un agrément personnel à l'individu propriétaire.

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Dans le premier cas, on doit présumer que le droit concédé est une servitude réelle, quoiqu'on ne lui en ait pas donné le nom. Ainsi, par exemple, si j'ai stipulé le droit de passer avec une charette et chevaux sur le fonds A, attenant au fonds B, dont je suis propriétaire, sans ajouter que le passage est pour l'utilité de mon fonds, ce n'en est pas moins une servitude réelle établie pour l'usage du fonds B.

Il en est de même, etc...

Au contraire, si, par sa nature, la concession ne paraît procurer qu'un agrément personnel à l'individu, elle ne peut être considérée que comme stipulée en faveur de la personne, et ne peut être rendue réelle que par une énonciation expresse.

Par exemple, si le propriétai[illegible] maison voisine d'un parc, d'un jardin, stipule le droit d'y passe[illegible]omener, d'y cueillir des fruits, des fleurs, la concession sera cons[illegible] un droit personnel à l'individu; ce ne sera pas une servitude, p[illegible]de proscrit formellement les servitudes personnelles.*

Ainsi, l'acquéreur du parc ne serait point obligé de souffrir l'exercice d'un pareil droit, à moins que son contrat d'acquisition ne l'y obligeat.

Idem. No. 590, 3 al.

Tout dépend donc de savoir si le droit est concédé au fonds ou à la personne; or, il est concédé au fonds toutes les fois qu'il ne peut être exercé que par le possesseur du fonds, quel qu'il soit, et que ce possesseur perd la faculté de l'exercer en perdant la possession du fonds."

By applying those principles the Court of Cassation in a case of Duplessis and another vs. Beaucher (Sirey 1825–1–39) has decided that the charge not to build, except on a certain line, imposed by the owner of a house on the purchaser of an adjoining lot of land, was a servitude in favour of the vendor's property, and not an obligation to him personally.

The circumstances are thus stated in the report.

" 15 mars 1790, vente par Marette à Houdar de [illegible] d'un corps de bâtiment situé au bourg de la Rivière. Il est dit dans [illegible]rat que la vente comprend le terrain qui est *devant* et au bout des objets rétrocédés, pour autant qu'il en peut appartenir au dit Marette, sur lequel terrain le preneur *ne pourra faire bâtir, si ce n'est sur celui du bout et sur l'alignement du dit corps de bâtiment.*"

The terms in which this charge not to build is created are almost identical with those contained in the deed of sale by the appellant to Perrault, and although both the property sold by Marrette to Houdar and the one he had retained for himself had changed hands, without any mention having been made of this charge in the deeds of alienation, yet the Court held this charge to be a servitude which passed with the property for the benefit of which it had been stipulated, and followed in the hands of third parties, that on which it had been created.

We consider that the Court below has not made a proper application of the rules of law applying to servitudes, and that the judgment must be reversed.

* En cela le Code Français diffère du Code Civil du B. C.

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It is needless to examine whether, if this had been a charge in favour of the appellant personally, he could have compelled the respondent, who is a third party, to comply with the obligation imposed by the sale to Perrault. I may however state that, for my part, I would have been strongly inclined to say that he could, more particularly as the respondent has by his deed of purchase assumed towards the appellant all the obligations to which Perrault was bound by his own deed.

The following was the written judgment of the Court:

"La Cour * * * considérant que l'acte de vente que l'appelant a consenti à Jean Baptiste G. Perrault le 5 avril 1875 devant Mtre. McIntosh, notaire, d'un lot de terre situé dans le quartier St. Antoine de la cité de Montréal, connu et désigné sous le No. 645 L sur le plan et dans le livre de renvoi officiels, vingt-cinq pieds de largeur par cent pieds de profondeur, mesure anglaise, borné en front par la rue Scotland projetée (maintenant appelée rue Donegana), en arrière par une ruelle, au nord-est par une autre ruelle, et sur le coté sud-ouest par la sub-division M du dit lot No. 645 appartenant au dit Henry Hamilton, contient la stipulation suivante: 'Il est entendu que toute batisse qu'érigera le dit 'acquéreur sur le dit terrain sera en ligne avec celle du vendeur;'

"Et considérant qu'il y avait lors de la dite vente sur le lot de terre subdivision M du dit lot No. 645 appartenant au dit appelant, une maison en briques qui existe encore, et que cette stipulation que l'acquéreur n'érigerait aucune batisse si ce n'est en ligne avec celle du vendeur constitue une servitude *non ædificandi*, à laquelle l'acquéreur a soumis son terrain envers le dit appelant en autant que propriétaire de la maison et du lot voisin, subdivision M du dit lot No. 645;

"Et considérant que le dit acte de vente a été bien et duement enregistré le 7 janvier, 1876;

"Et considérant que l'intimé en cette cause a acheté le dit lot de terre subdivision L du dit lot numéro 645 du dit Jean Baptiste Perreault, et que par son acte d'acquisition passé devant Maître Labadie, Notaire, le 26 mai 1876, il s'est obligé de se conformer à toutes les obligations, prohibitions, et restrictions mentionnées au dit acte de vente du 5 avril 1875;

"Et considérant qu'au mépris de la servitude imposée par le dit acte de vente du dit 5 avril 1875, et des obligations contractées par l'intimé par son acte d'acquisition, ce dernier a malgré les protestations de l'appelant érigé sur le dit lot de terre subdivision L du No. 645 du plan officiel du quartier St. Antoine de la cité de Montréal, et avait lorsque cette action a été portée, commencé à ériger une maison dont le front est à douze pieds six pouces en avant de la ligne prolongée du front de la maison qui existait à la date du dit acte de vente, sur le dit lot subdivision M du dit lot No. 645 appartenant au dit appelant.

"Et considérant que sous ces circonstances l'appelant est fondé à demander comme il le fait par son action, la démolition de cette partie de la maison ainsi érigée par le dit intimé, qui se trouve en avant de la prolongation de la ligne suivant le front de la maison du dit appelant erigée sur la subdivision M du dit lot No. 645.

"Et considérant qu'il y a mal jugé dans le jugement rendu par la Cour Supé-

rieure siégeant à Montréal le 30 novembre 1877, qui a renvoyé l'action de l'appelant : Hamilton and Wall.

"Cette Cour casse et annule le dit jugement du 30 novembre 1877, et procédant à rendre le jugement qu'aurait du rendre la dite Cour Supérieure, adjuge et déclare que le dit lot de terre, subdivision L du lot No. 645 du quartier St. Antoine de la cité de Montréal, appartenant à l'intimé, est chargé envers la subdivision M du dit lot No. 645 qui lui est contigue et qui appartient à l'appelant, d'une servitude, laquelle consiste dans l'obligation imposée par le dit acte de vente du 5 avril 1875 de ne pouvoir ériger aucune bâtisse sur le dit lot subdivision L du dit lot No. 645, si ce n'est en ligne avec la maison déjà érigée sur le lot subdivision M du dit lot No. 645, appartenant au dit appelant, et ordonne au dit intimé de discontinuer toute construction de bâtisse commencée en avant de la ligne prolongée du front de la maison de l'appelant, et le condamne à démolir, sous un mois de la signification du présent jugement, toute la partie de la maison par lui érigée sur le dit lot subdivision L du lot No. 645 en avant de ligne prolongée du front de la maison du dit appelant sur la dite subdivision M du dit lot No. 645, et à défaut de ce faire dans le dit délai, il sera permis au dit appelant sous l'autorité de la Cour Supérieure de faire démolir la partie de la dite maison de l'intimé qui se trouve excéder la ligne prolongée du front de la maison de l'appelant, le tout aux frais de l'intimé, et condamne en outre le dit intimé à payer à l'appelant les frais encourus tant en Cour Supérieure que sur le présent appel. (L'Hon. M. le juge Monk dissident.)

Judgment of S. C. reversed.

Judah, Wurtele & Branchaud, for appellant.
Bethune & Bethune, for respondent.

(S. B.)

CIRCUIT COURT, 1880.

MONTREAL, 23RD JANUARY, 1880.

In Chambers.

Coram TORRANCE, J.

No. 9955.

Cruickshank es qual. vs. *Lavoie.*

HELD :—That notice of application for security for costs must be given within four days after return of writ by non-resident plaintiff. Rousseau vs. Trudeau et al., 13 L. C. J. 138, and Newark Patent Leather Co. vs. Wolff, 14 L. C. J. 18, followed. Vide Batten vs. Close, 1 Rev. Crit. 247.

Robidoux, for plaintiff.
Adam & Duhamel, for defendant.

(J. K.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 16th SEPTEMBER, 1879.

Coram Sir A. A. DORION, C.J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 11.

HON. DAVID A. ROSS, Attorney General,

(Plaintiff in the Court below,)

APPELLANT;

AND

THE MONTREAL CITY PASSENGER RAILWAY CO.,

(Defendants in the Court below,)

RESPONDENTS.

HELD:—1. That a Street Railway Company, authorized by statute (24 Vict. c. 84) to construct a track upon and along the highways in the parish of Montreal leading into the streets of the City "and to use and occupy any and such parts of any of the streets or highways aforesaid as "may be required for the purpose of their railway track and the laying of the rails and "the running of their cars and carriages," exceeds its powers by laying the track on one side of a highway, within six feet from the line of the adjoining property, the value of which was thereby greatly diminished. Where a right of passage is given it should be exercised *ex æquo et bono*, in accordance with the use and destination of the highway, so as to cause as little inconvenience as possible (compatible with the exercise of the privilege) to the public and the adjoining proprietors. And, in the present case, the track should have been constructed on the part of the highway used by vehicles, and not on one side thereof used by persons on foot, and where the running of the cars interfered with access to the adjoining property.

2. Neither the trustees of the Montreal turnpike roads nor the municipality of the parish had any right to authorize the laying of the track of the railway on one side of the highway, so as unnecessarily to injure the adjacent property.

The judgment complained of was rendered by the Superior Court, Montreal, (JOHNSON, J.,) dismissing the appellant's action.

The facts are fully stated in the opinion of the Chief Justice.

SIR A. A. DORION, C. J.:—Le Procureur Général de la Province de Québec, à la suggestion des représentants de feu Stanley Bagg, a présenté une requête libellée en vertu de l'article 1016 du Code de Procédure, pour forcer la Compagnie des Chemins à lisses de la Cité de Montréal, à enlever les lisses, qu'elle a placées sur le chemin public, entre l'église du Coteau St. Louis et la gare du Chemin de Fer de Québec, Montréal & Occidental dans la paroisse de Montréal.

Les Commissaires des Chemins de Péage de Montréal, qui ont le controle de ce chemin, ont été mis en cause comme défendeurs.

La Compagnie intimée répond qu'elle a été autorisée par sa charte à placer des lisses dans ce chemin, et qu'elle l'a fait avec l'assentiment et en vertu d'arrangements faits avec la municipalité du Coteau St. Louis où se trouve ce chemin, ainsi que des Commissaires des Chemins de Péages.

La Cour Supérieure a renvoyé la demande de l'appelant, parcequ'il n'avait pas prouvé que la Compagnie avait excédé ses pouvoirs, et que l'allégué que les lisses de la Compagnie causaient des dommages à la propriété des héritiers Bagg n'avait aucune influence sur la contestation.

Voici quels sont les faits qui apparaissent au dossier:

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La Compagnie a été incorporée en 1861, (24 Vict. c. 84). Elle est autorisée (sect. 4.) à faire un chemin à lisses, dont les chars seraient traînés par des chevaux dans certaines rues de la Cité de Montréal, et entr'autres dans la rue St. Laurent, et aussi dans les chemins publics de la paroisse de Montréal aboutissant à ces rues, *et de se servir de toutes et telles parties de ces rues et chemins qui seraient nécessaires pour y mettre ses lisses et faire circuler ses chars.* Elle doit placer ses lisses au niveau des rues et des chemins et suivre leur élévation et déclivité, de manière à causer le moins d'obstacle possible au traffic ordinaire qui se fait sur ces rues et chemins (sect. 5).

En exécution de ces pouvoirs la Compagnie a placé des lisses dans la partie du chemin au delà des limites de la Cité, qui forme la continuation de la rue St. Laurent, à l'endroit indiqué dans un acte fait avec les Commissaires des Chemins de Péages.

Ce chemin a environ soixante-et-un pieds de largeur, dont vingt-neuf ou trente pieds sont macadamisés et servent à l'usage de voitures, et quinze ou seize pieds de long des propriétés riveraines de chaque coté sont à l'usage des piétons. La partie à l'usage des voitures est séparée de ce qui est pour l'usage des piétons par une fosse ou rigolet de chaque coté, qui sert à l'écoulement des eaux. La partie réservée pour les piétons est plane et plus élevée que les bords de la partie macadamisée du chemin.

La Compagnie a placé ses lisses au centre de la rue St. Laurent, mais dans la partie du chemin qui est dans la paroisse de Montréal, depuis l'eglise du Coteau St. Louis, jusque vis-à-vis la gare du chemin de fer, elle a dévié de la ligne suivie dans la rue St. Laurent, et les a placées à une distance de six à huit pieds de la ligne de la propriété des héritiers Bagg, qui sont propriétaires riverains sur une assez grande étendue du parcours du chemin, en sorte que les chars, en passant à cet endroit, ne laissent qu'une distance de cinq pieds dix pouces à sept pieds entre les chars et la ligne de la propriété des héritiers Bagg.

Tous les témoins s'accordent à dire qu'il aurait été mieux de placer les lisses dans le milieu du chemin, et il est prouvé d'une manière indubitable que les lisses placées où elles sont causent un préjudice notable à la propriété des héritiers Bagg, et quelques témoins estiment les dommages à cinquante ou soixante pour cent de la valeur de la propriété.

Lévesque, qui est un architecte, dit que, depuis que la Compagnie a placé ses lisses, la propriété des héritiers Bagg n'est plus vendable en lots pour y ériger des maisons.

Shackell dit qu'elle n'est pas accessible.

Guilbault, Labranche et Lamontagne disent que la dépréciation causée par le chemin de la Compagnie est d'au moins la moitié de la valeur de la propriété.

L'Hon. M. Ferrier dit qu'il ne croit pas que les propriétaires du terrain à l'Ouest de la rue (les héritiers Bagg) pourront vendre leur terrain en approchant de la valeur qu'il aurait eu, si la Compagnie avait placé ses lisses dans le milieu du chemin. Ces lisses sont sur le trottoir qui existait avant que le Chemin ne fut élargi et à six pieds quelques pouces de la ligne de la propriété Bagg. Il sait que la Compagnie avait placé dans la rue Notre Dame ses lisses d'un coté de la rue, de manière que les voitures ne pouvaient s'arrêter de ce coté-là, et que

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lui-même et d'autres propriétaires se sont plaint à la corporation que cela diminuait la valeur de leurs propriétés, et que la corporation reconnaissant la justice de leur reclamation, a fait placer les lisses dans le milieu de la rue. Il ajoute que les lisses sont placées, vis-à-vis la propriété Bagg, d'une manière plus désavantageuse à cette propriété, qu'elles ne l'étaient aux propriétés rivraines dans la rue Notre Dame.

Les témoins de la défense ont cherché à atténuer l'effet de cette preuve, en disant que l'existence du chemin à lisses était d'un grand avantage pour la propriété des héritiers Bagg, et que cet avantage excédait les dommages qui pouvaient résulter de sa proximité. L'un d'eux, tout en admettant que les lisses sont trop près, dit que le chemin est avantageux pour les héritiers Bagg, parce qu'ils pourraient donner une dixaine de pieds de leur terrain pour élargir le chemin entre leur propriété et les lisses de la Compagnie. Mais ce témoin, comme tous les autres, à une exception près, admet que les lisses seraient mieux placées si elles étaient au milieu du chemin.

La Compagnie n'a pas fait voir, soit qu'il fut impossible de placer les lisses dans le milieu du chemin, ou qu'il y avait quelque avantage à les placer où elles l'ont été. Elle prétend qu'elle les a placées à l'endroit qui lui a été indiqué par les Commissaires des Chemins de Péages, avec l'assentiment de la Municipalité, et qu'elle avait par sa charte le droit de les placer comme elle l'a fait.

Etant prouvé que le chemin de la Compagnie cause un préjudice considérable à la propriété Bagg, que les lisses sont placées à l'endroit ordinairement réservé pour les piétons, et que la Compagnie pouvait sans inconvénient les placer au milieu du chemin où elles n'auraient pas causé de dommages aux propriétaires riverains, il reste à examiner, si la Compagnie pouvait placer ses lisses sur telle partie quelconque du chemin que les Commissaires des Chemins de Péages jugeraient à propos de lui indiquer, quelque fut le dommage que cela pourrait causer aux voisins. Si elle le pouvait, il s'en suit que les Commissaires auraient pu indiquer un tracé à quelques pouces seulement de la ligne divisant la propriété Bagg du chemin, de manière que les chars, en passant, auraient pu effleurer leur propriété, sans qu'ils eussent le droit de se plaindre, et c'est en effet ce que la Cour Inférieure a jugé, en consignant dans un des motifs de son jugement, que l'allégué que les héritiers Bagg souffraient un préjudice n'avait aucun rapport à la question (is irrelevant), dit le jugement.

Pour déterminer cette question il faut examiner quel est le droit qui est conféré à la Compagnie par sa charte.

La Législature a accordé à la Compagnie le privilége de placer des lisses dans les rues et chemins publics, pour s'en faire une source de revenus. C'est la l'appropriation d'une partie de la propriété publique au profit d'une Compagnie privée. Cette attribution d'une partie de la voie publique, ne constitue pas, il est vrai, ce que l'on désigne ordinairement sous le nom de servitude, puisqu'une servitude est une charge créée sur un fonds, en faveur d'un autre fonds. Mais c'est au moins un droit d'usage en faveur de la compagnie intimée. C'est ce que l'on aurait désigné sous le droit Romain sous le nom de servitude personnelle. *Servitudines aut personarum sunt, ut usus et usufructus, aut rerum*

ut servitutes, rusticorum, praediorum et urbanorum." (L. 1. § de servit.) (Pothier, Coutume d'Orléans. Introduction au Titre XIII No. 2)

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Si le droit de la Compagnie constituait une véritable servitude, elle ne pourrait l'exercer que de la manière la moins incommode pour les propriétaires du fonds assujeti, c'est-à-dire, pour le public et les propriétaires riverains qui sont les plus directement intéressés à ce qu'il n'y ait aucune obstruction de la voie publique, vis-à-vis de leurs propriétés. (Code Civil, 553-557 et 558; Demolombe des Servitudes, No. 834 et 835.)

Lorsque le titre ne détermine pas comment la servitude, un droit de passage, par exemple, doit s'exercer, il doit être réglé *ex æquo et bono*, selon l'usage et la destination des lieux, et d'après toutes les circonstances de manière à concilier ce qui est le plus avantageux pour celui qui l'exerce et le moins incommode pour ceux qui doivent la souffrir, et s'il y a doute c'est pour ceux-ci que l'on doit se décider. (Domat, Lois Civ., liv. 1, tit. 22, sec. 1, No. 9. Demolombe, *loc. cit.* No. 843, *in fine* et No. 869.)

Le droit d'usage est plus restreint que celui de servitude, et les règles que nous venons d'indiquer sont également applicables à l'un comme à l'autre; et comme tout privilége, celui de la Compagnie ne doit pas être étendu au delà de ce qui est absolument nécessaire pour l'exercice du droit qu'il lui confère.

D'après ces règles la Compagnie aurait dû placer ses lisses dans la partie du chemin destinée aux voitures, puisque, d'après la preuve, cela aurait été aussi avantageux pour la Compagnie et n'aurait causé aucun dommage aux propriétés voisines, et aurait été conforme à la destination du chemin et à l'usage ordinaire que l'on en fait.

La règle "*Sic utere tuo ut alienum non lædas*" est d'une application si universelle qu'elle s'étend à tous les droits et privilèges de quelque nature qu'ils soient dont l'exercice peut affecter les droits d'autrui. Elle ne s'applique pas seulement aux individus; mais aussi au public et aux corps publics. "Every "man is restricted against using his property to the prejudice of others.... "and this rule of law applies to the public in at least as full force as to indi- "viduals." (Lord Truro in Egerton and Earl Brownlow, 4 H. L. C. 195.

La Compagnie ne peut donc pas prétendre qu'ayant agi en vertu de l'autorité des Commissaires des Chemins de Péages, et de la Municipalité, qui représentaient le public, elle a pu placer ses lisses comme elle l'a fait, sans égard aux dommages que cela pourrait causer aux propriétés voisines,—puisque ni les Commissaires, ni la Municipalité n'auraient pu le faire.

De plus la Compagnie est tenue par sa charte de placer ses lisses au niveau des rues. Or, cela ne peut s'entendre que de cette partie de la rue destinée aux voitures, et non de celle destinée aux piétons qui est plus élevée que le reste.

Il n'est pas du reste à supposer que la Législature en autorisant la Compagnie à placer des lisses dans les rues et chemins publics, ait entendu lui conférer le droit de les placer même sur les trottoirs, si elle le jugeait à propos.

A tous les points de vue la prétention de l'intimé est mal fondée.

Cette Cour croit donc que la Compagnie a abusé de son privilége en plaçant ses lisses à l'endroit réservée pour les piétons, lorsqu'elle pouvait sans incon-

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vées pour le public et pour les propriétaires riverains les placer dans la partie réservée pour les voitures.

Le jugement de la Cour Inférieure est infirmé, et il est ordonné à la Compagnie intimée d'enlever, sous un mois, les lisses qu'elle a placées sur la propriété des héritiers Bagg, sauf à les placer dans la partie du chemin affectée aux voitures, et condamne la Compagnie intimée à payer les dépens.

The judgment was as follows:

"The Court, etc. . .

"Considering that the Company, respondents, to wit, the Montreal City Passenger Railway Company, are authorized by their charter, to wit, their Act of Incorporation, 24 Vic. cap. 81, to construct a double or single track iron railway, the cars whereof to be drawn by horses upon and along any of the streets in the city of Montreal which are mentioned in bye-law No. 203 of the Corporation of the City of Montreal, and upon and along the highways of the parish of Montreal leading into the said streets; and to use and occupy any such parts of the said streets or highways as may be required for the purpose of their railway, their laying of the rails, and the running of their cars and carriages.

"And considering that this grant, constituting as it does a privilege in favor of the Company, whether viewed as a franchise, a right of user, *un droit d'usage*, or a personal servitude, must be exercised according to the ordinary mode of using such rights and in such manner as to cause the least possible inconvenience or injury to the public and to the adjoining proprietors in the use of the said streets and roads, consistent with the exercise of such privilege;

"And considering that it appears by the evidence adduced in this cause, that in and over that portion of the highway situate in the parish of Montreal which is a continuation of St. Lawrence Main street of the city of Montreal, extending from the place in the said highway where it is intersected by St. Louis street, to the place where a road leaves the said highway opposite and leading to the station of the Quebec, Montreal, Ottawa & Western Railway, known as the Mile End Station, the said Company have placed their track and rails on the western side of the said highway, so as to encroach upon, encumber and inconvenience that portion thereof usually appropriated for and used by the public as a footpath for foot passengers, and not on that portion thereof used for carriages;

"And considering that it is in evidence in this cause that said placing of said track and rails, and the running of cars thereon, adjacent and in such near proximity to the properties situate on the westerly side of such highway, is injurious and detrimental to said properties, and particularly to those of the representatives of the late Stanley Clarke Bagg, the relators in the present case;

"And considering that it is proved in this cause that there is ample space for the placing of said track and rails upon the said highway to the eastward of the line they now occupy, without injury to the property of the adjoining properties, and that there was no necessity for placing them in their present position;

"And considering that the trustees of the Montreal Turnpike Roads, parties

in this cause, who have the control of said highway, could not by any permission or authority given by them, empower or justify the said City Passenger Railway Company in placing their said track and rails in the manner they have done, so as to unnecessarily injure the adjacent properties, and to interfere with the use of such portion of said highway as is usually devoted to the footpath and the passing of foot passengers;

"Considering, therefore, that there is error in the judgment herein rendered by the Superior Court at Montreal on the 30th day of November, 1878, this Court doth cancel and reverse the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth order and adjudge that within thirty days of the service of this judgment, the said Montreal City Passenger Railway Company do remove and take away their said track and rails from the position and locality in which they have been so placed on that portion of the said highway in the Parish of Montreal, being the continuation of St. Lawrence Main Street from, &c., &c., reserving to the said City Passenger Railway their right to place their said rails elsewhere upon said highway as to law and justice may appertain, and in default of the City Passenger Railway conforming to the present judgment within the said delay, it is ordered that the said track and rails be removed under the authority of the said Superior Court, at the cost and charges of the said City Passenger Railway, respondents in this cause."

Judgment of S. C. reversed with costs.

Doutre, Branchaud & McCord, for appellant.

Abbott, Tait, Wotherspoon & Abbott, for respondents.

(J.K.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 20TH DECEMBER, 1879.

Coram HON. SIR A. A. DORION, Ch. J., MONK, J., RAMSAY, J., TESSIER, J., SICOTTE, J., *ad hoc*.

No. 83.

BLACK ET AL., APPELLANTS;

AND

THE NATIONAL INSURANCE COMPANY, RESPONDENT.

HELD:—1. That where a fire policy, taken out by the owner of real property, declares that the loss, if any, is payable to certain persons named "as mortgagees to the extent of their claim," such persons become thereby the parties assured to the extent of their interest as mortgagees, and that their rights and interests cannot be destroyed or impaired by any act of the owner of the property.

2. That the preliminary proofs of loss made by the appellants were sufficient, and that the respondent waived any right to complain of any delay in furnishing the same.

RAMSAY, J. (*dissentiens*):—This case has given rise to a good deal of discussion and difficulty on several questions. With all but one of these questions I agree with the conclusion arrived at by the majority of the Court, and I shall

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therefore refrain from entering at length into any of the questions. It will be sufficient for me to say that I think the plea by which it is attempted to insinuate, without saying it in so many words, that the Blacks set fire to the building, is wholly unjustifiable. If it is intended to make a defence on the ground of the criminality of the insured, the fact should be formally pleaded. For myself, I may say that I should not consider any evidence, no matter how conclusive it might appear, on a plea so drawn. I also consider that the insurance is that of the father although taken out in the names of the sons, and that the re-insurance is also that of the father. I also consider that as there was no notice of the re-insurance, as required by the conditions of the policy, the policy became inoperative, at all events so far as Farrar is concerned. But there was a stipulation in the policy, "loss, if any, payable to Messrs. J. & H. Black, as mortgagees, to the extent of their claim," and it is now contended that, although the policy is void as regards Farrar, the stipulation survives, and entitles the appellants, J. Black, to recover to the extent of their interest. It is on this question I am unable to concur with the opinion of the majority of the Court. In England it seems this question has not arisen, probably owing to some difference in the way of dealing with the interests of mortgagees; but it has come up on several occasions in Ontario. It is to be regretted that the jurisprudence there is in a very unsettled state, and I have been unable to discover on which side the weight of authority leans. Had that appeared clearly, it is not probable that I should have entered any dissent on this occasion. Two systems seem to divide opinion. By one the terms of the contract between the party claiming and the insurer is interpreted precisely in the same manner as we interpret the terms of any other contract. By the other the policy is treated as being transferred or assigned to the mortgagee in whatever terms the stipulation is couched, whether the mortgagee becomes the insured or not. It will be at once perceived that these two systems lead to very different results, and I think the former is much more consonant with principle than the latter. The stipulation is plainly an undertaking to pay B out of the money coming to A, if any there be. The other system is that of a fictitious assignment, the policy being held in trust for the original insurer, should the mortgage be paid off or should there be a balance over. Whatever may be the practical convenience of the latter system, it is one hardly in accordance with the principles of our law, or indeed compatible with any sound principle. It alters the obligation of the insurer, and exposes him to perils which the contract he has entered into, on its face, does not contemplate.

I should, therefore, confirm the judgment on the simple motive that the policy being void there was no "loss," and therefore nothing coming to appellant.

MONK, J., also dissenting, concurred substantially in the above remarks of Mr. Justice Ramsay.

SIR A. A. DORION, CH. J.:—This is an appeal from a judgment of the Superior Court dismissing the action of the appellants on an insurance policy issued by the Company respondent.

On the 17th of February, 1874, George Whitfield Farrar and his sons, George H. Farrar and Lucius E. Farrar, acknowledged to owe to the appellants, John

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Black and Henderson Black, doing business at St. Johns, P.Q., under the names of J. & H. Black, a sum of $4,000, to secure the payment of which sum and interest they hypothecated an immoveable property situate at St. Johns. As a further security the mortgagors promised to insure, to the extent of $8,000, the buildings on the property hypothecated, and to transfer the insurance policy to the mortgagees.

On the 3rd of July, 1876, George Whitfield Farrar, who had, in the meantime, become the sole owner of the property hypothecated, insured the buildings with the Company respondent for $1,800, the "*loss, if any, payable to J. & H. Black, as mortgagees, to the extent of their claim.*"

The buildings insured were destroyed by fire on the 10th day of September, 1876.

The three appellants John and Henderson Black, and George Whitfield Farrar have united to bring this action. They allege in their declaration the insurance policy, the destruction of the buildings, and that, when the insurance was effected and when the fire took place, the property insured was mortgaged to the two Blacks to the extent of $9,850, by virtue of the above mentioned obligation and of another mortgage, and they pray by their conclusions that the Company respondent be condemned to pay to the appellants, John and Henderson Black, the sum of $1,800, for which the buildings were insured.

The respondents, by their first plea, have alleged that one of the conditions of the policy was that, if the assured should hereafter make any other insurances on the property thereby insured, without the consent of the Company written thereon, the policy should be void, and that, in violation of said condition George Whitfield Farrar had, on the 12th of July, 1876, insured the same buildings with the Royal Canadian Insurance Company for $6,000, loss, if any, payable to E. & D. McDonald, and that the policy issued by the respondents had thereby become void.

By a second plea the respondents allege that the appellants have not forthwith given notice of the fire, nor furnished within fifteen days a claim of their loss, certified and attested as required by the conditions of the policy.

There are several other pleas which have not been insisted upon before this Court.

The action has been dismissed on the two grounds: 1st. That Farrar had not furnished in proper time (*en temps utile*) a regular and attested claim of his losses. 2nd. That the policy had been avoided by the subsequent insurance with the Royal Canadian Insurance Company, without the consent of the respondents.

The question raised by the first plea is one of great importance as affecting the interests of most, if not all, the hypothecary creditors, who look to an additional security for their investments in the insurance of the buildings hypothecated for the payment of their mortgages.

These insurances are sometimes made in the name of the mortgagees, but more generally, whether effected by the mortgagees or by the mortgagors, the policies are issued in the name of the latter, and they are either transferred to the mortgagees with the consent of the insurers, or, as in this instance, the loss, if any, is, by the policy, made payable to the mortgagees to the extent of their claim.

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What is the effect of such a transfer in the one case or delegation in the other; and can the mortgagor, after such transfer or delegation, impair or destroy, by any act of his, the ri[illegible] conveyed to the mortgagee?

This is the real [illegible]

Very little assistance can be derived from the text writers or from any decisions in either France or England, where the question does not seem to have ever been discussed or adjudicated upon.

In the United States, where the contract of insurance is so frequently resorted to in all its varied forms, the question has repeatedly been raised, but the decisions are so conflicting that it is impossible to say that there is any fixed jurisprudence on the subject.

As far back as the year 1832, the Supreme Court of the State of New York decided in the case of The Traders Insurance Co. *v.* Robert (9 Wendell's Rep. 404) that, after a transfer of an insurance policy had been made to a mortgagee with the consent of the insurer, such policy could not be invalidated, so as to affect the rights of the transferee, by a subsequent insurance made by the mortgagor.

This decision was followed by that of Tillou *v.* The Kingston Mutual Insurance Co. 1851, (1 Seldon Rep. 405) wherein the Court stated the question was hardly an open one.

The principle on which these cases were decided is accepted without reserve by Phillips on Insurance § 84, where he says:

"After a valid assignment and delivery of the policy to the assignee, and "notice to the underwriter, the assignor cannot, by any act of his, intercept or "impair the rights of the assignee under the assignment."

Angell, on Insurance, also says, § 61:

"The consent of the insurer that a policy previously issued to the owners of "the property may be assigned to the holder of a mortgage, *will be deemed in "the nature of a contract with him, by which he becomes insured, to the amount "which the assignment intended to secure.*"

Duer, Vol. 2, § 35 [illegible] expresses himself in the same sense.

Parsons, in his work on Mercantile Law, p. 535, uses the following language:

"Undoubtedly no insured party can make a transfer which shall operate "injuriously on the insurers, and yet preserve the rights so transferred. On "the other hand, if he, by the terms of the policy, may transfer it with the con"sent of the insurers, and after such transfer and consent, the originally insured "party fraudulently burns the building, there would be strong reasons for hold"ing the insurance still valid in favor of the innocent transferee."

* * * * * * * * *

"*Where possible, such transfer, with such consent, would, undoubtedly, be "regarded as a new and independent contract with the insurer.*"

The following passage is to be found in the United States Digest, of 1873, pp. 383 and 384:

"There is a third class of cases where the assignment may have a twofold "operation, and it is not always easy to say which was designed. This occurs "where the policy is transferred to a mortgagee of the property insured. *Here*

"*there are two insurable interests, each of which may be a good ground of* "*action, notwithstanding the determination of the other.* The mortgagor is "entitled to indemnity as the owner of the equity of redemption; the mort- "gagee by virtue of his lien for the debt, and as the extinguishment of the "mortgage will not affect the right of the mortgagor, *so a sale or alienation by* "*the mortgagor will not preclude a recovery by the mortgagee.*" (Insurance Company of Pennsylvania v. Trask, 8 Phil. 32.)

In Boynton, Southwick and others, v. Clinton and Express Mutual Ins. Co. (16 Barbour 254), both the mortgagor and the mortgagee joined in the action, which was dismissed as to the mortgagor, because since the transfer of the policy he had sold one half of the insured property; and it was maintained as to the balance due to the mortgagee, who was declared not affected by the act of the mortgagor subsequent to the transfer of the policy.

In the case of Fogg v. Middlesex Mutual Fire Insurance Company (10 Cushing, 337) Chief Justice Shaw said, that "a sale or alienation of the insur- "ed property, coupled with a transfer of the policy to the purchaser made with "the assent of the Company, creates a new and original contract, embracing all "the elements of a contract between the assignee and the insurers," but he held that a policy making the loss payable to A. B. stood on a different footing, and was a mere contingent order to pay what would become due under the policy and giving no right to the party in whose favor it was made to recover as the insured party.

The views expressed by Judge Story in Carpenter v. Providence Washington Insurance Company (16 Peters, 495) seem irreconcilable with those of C. J. Shaw, unless it should be said that the effect of a transfer to a mortgagee is not the same as that of a transfer to a vendee, for he there held that "an assignment "to a mortgagee operates solely as an equitable transfer of the policy, so as to "enable the mortgagee to recover the amount due in case of loss; but does not "displace the interest of the mortgagor in the premises insured. On the con- "trary, the insurance is still his insurance, on his property and for his account."

In the case of Grosvenor v. The Atlantic Insurance Company of Brooklyn (17 N. Y. Rep. 391) the Court of Appeal of the State of New York, reversing the judgment of the Court below, held that the rights of a mortgagee under an insurance policy effected by a mortgagor, and containing a stipulation that the loss, if any, should be payable to the mortgagee, were defeated by a subsequent sale of the property by the mortgagor.

May, on Insurance, p. 461, cites this case as having overruled the cases of The Traders Insurance Company & Robert and Tillou & The Kingston Mutual Insurance Company; but, on referring to the report of the case, it will be found that out of the four judges who expressed their views (and the report does not indicate that other judges took part in the judgment), Judge Harris alone expressed his unqualified dissent from the decisions in the two last mentioned cases. Judges Selden and Strong concurred in the reversal, distinguishing this from the case where a policy is assigned with the assent of the insurers, in which last case the doctrine of The Traders Insurance Company & Robert should be maintained, and Judge Roosevelt dissented altogether from the judgment rendered by the other three judges.

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Judge Harris expressly stated that he agreed with the judges of the Court below, that there was no just ground for discriminating between this case and that of an assignment of a policy to a mortgagee, to be held by him as collateral security for his debt with the consent of the insurer.

Out of the four judges three were for reversing the judgment of the Court below, three for sustaining the doctrine held in the case of The Traders Insurance Company & Robert, two for distinguishing the two cases from one another, and two who, agreeing with the Court below, were for holding that the two cases were not distinguishable, and that there was no difference as regards the mortgagee between a policy wherein the loss was made payable to him and a transferred policy.

Whatever may be the value of such a judgment it certainly did not overrule the case of The Traders Insurance Company & Robert, nor that of Tillou & The Kingston Mutual.

May, p. 461 and following, agrees to this much, that when the property insured is sold, and the policy transferred at the same time to the purchaser, with the assent of the insurers, "it seems not unreasonable that the assignee becomes "by substitution as owner of the property the party insured," but that "where "the policy is merely made payable in case of loss to the mortgagee, this is no "assignment of the policy. Nor does it convert the policy into a contract of "insurance with the mortgagee, and he is liable to all the deficiencies against "the policy to which the applicant might be."

May, however, admits that there are respectable authorities opposed to his views on this question.

In addition to several cases which he cites, there are the cases of Woodbury & Charter Oak Insurance Company (31 Conn. 518), and Pratt v. The N. Y. Insurance Company (64 Barbour, 590), in which it was held that, notwithstanding a second insurance had been effected by the mortgagor in the first case, and a sale had taken place of the property insured in the second, the mortgagees, to whom by the policies the loss was made payable, were entitled to recover. In the last case the insurance had been effected by the mortgagee in the name of the mortgagor, but the two policies were in the same form, and therefore only susceptible of the same interpretation.

It would be impossible to refer to all the various decisions rendered on this question in the several States of the Union.

The predominating opinion seems to be that after a transfer of a policy of insurance to a mortgagee accepted by the insurer, the right of the mortgagee to recover cannot be prejudiced by the subsequent acts of the mortgagor, and this is in accordance with the rules applying to conveyances in general.

Opinions are more divided as to the effect of a policy made payable to a mortgagee, and the question does not seem to have been finally set at rest, yet it would seem that the tendency is towards the opinion that there is no difference between a policy transferred to the mortgagee and one in which the loss is made payable to him.

In Ontario the same questions have been raised in several cases, and there also they have elicited a great diversity of opinions among the judges.

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The first case to be found is that of Burton v. The Gore District Mutual Insurance Co. (14 U. C. Q. B. 342). One Montgomery gave a mortgage on his property to the plaintiff Burton, and afterwards transferred to him, with the consent of the defendants, a policy of insurance, which they had issued, and which contained the usual condition that it should become void by reason of any subsequent insurance effected by the assured, without the consent of the company.

Later, one Rastrick, who had a mortgage on the same property, insured it, to secure his claim, and Montgomery, also, effected a second insurance, without notice to the defendants.

The Court, presided over by Ch. J. Robinson, held: 1. That the insurance by Rastrick did not affect the claim of the plaintiff as assignee of the first policy. 2. That the second insurance by the mortgagor did affect the mortgagee, and his claim was rejected.

The three judges who decided the case arrived at the same conclusion, but on different grounds.

Burton having failed before the Court of Queen's Bench, adopted proceedings before the Court of Chancery and there succeeded. (12 Grant 159.)

Chancellor Vankoughnet in rendering the judgment said:

"I think the mortgagor by the subsequent insurance only destroyed his own "interest."

In this judgment Vice-Chancellor Moat concurred, while Vice-Chancellor, now Chancellor, Spragge, dissented from it.

The next case is that of Livingston v. The Western Insurance Co. (14 Grant). Here the policy was in the name of the mortgagor "loss, if any, payable to the mortgagee."

The Chancellor held this case was not governed by Burton vs. The Gore District Mutual Insurance Co., while the two Vice-Chancellors held that it was, and ruled, as in the other case, that the rights of the mortgagee were not defeated by a subsequent insurance by the mortgagor.

In appeal this judgment was reversed; there being six judges for reversing and one for confirming. The judges composing the majority seem to have distinguished this case from that of Burton v. The Gore District Mutual Insurance Co., on the ground that, in this last case, there was a transfer of the policy, while in that of Livingston there was no transfer, and that the condition avoiding the policy in case of a second insurance by the *assured* could only refer to an assurance by the mortgagor, and not to one effected by the mortgagee, who, although entitled to receive the insurance in case of loss, was not the party insured. (16 Grant, 9.)

In Smith v. The Niagara District Mutual Insurance Co., (38 U. C. Q. B. Rep. 570) the policy had been transferred to the mortgagee, and the learned Judge before whom the demurrer was heard referred to the judgment of the Court of Queen's Bench and of the Court of Chancery in the case of Burton v. The Gore District Mutual Insurance Co., as being both unsatisfactory, and relying mainly on a recent Mutual Insurance Companies' Act, he decided that the rights of the mortgagee, under the transfer of the policy, were destroyed by a subsequent insurance by the mortgagor.

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Then came the case of The Mechanics Building and Savings Bank v. The Gore District Mutual Fire Insurance Co., in which the learned judge who heard the case, approved of the principle held in Tillou v. The Kingston Mutual Insurance Co., already referred to, but thought this precedent was inapplicable and followed the case of Smith v. The Niagara District Mutual Insurance Co.

In appeal this judgment was reversed. The late Chief Justice Harrison, Judge Wilson, the present Chief Justice of the Court of Common Pleas, and Judge Morrison composing the Court.

In an elaborate judgment Chief Justice Wilson reviewed the arguments *pro* and *con*, and came to the conclusion that, by the transfer of the policy, the mortgagee had acquired a separate interest under the policy, which could not be destroyed by a contract for a further insurance made by the mortgagor without his knowledge. He was also of opinion that there was nothing in the Mutual Insurance Companies Act to take this case out of the general rule. The judges were unanimous in the conclusions arrived at, but Chief Justice Harrison and Judge Morrison both stated that, while concurring in the judgment, they did not concur in all the reasons stated by their brother, Judge Wilson.

I have referred at some length to the decisions in the United States and in Upper Canada, not so much on account of the influence which they can have here, as to show the extraordinary diversity of opinions entertained elsewhere and the extreme difficulty of the question.

This difficulty, in a great measure, is due to the difference attributed by some of the Courts, both in the United States and in Upper Canada, as to the effect of a transfer of a policy by a mortgagor to a mortgagee, with the consent of the insurer, and a policy by which the insurer promises to pay the loss to the mortgagee.

It is said the transfer of the policy is a transfer of the contract itself, while the promise by the insurer to pay the loss to the mortgagee is a mere obligation to fulfil an order to pay a contingent money claim.

We readily admit that the transfer of the policy is a transfer of the contract. The contract consists in the rights and obligations of the transferor under the policy. He has the right to recover the amount of the insurance on the contingency that he shall suffer a loss from the risk insured against and subject to all the conditions of the policy. The effect of the transfer of a policy, in whatever terms it is made, is to transfer the amount which may become due under the contract embodied in the policy and subject to all the conditions of that contract.

When a mortgagor transfers the amount stipulated in an insurance policy, or when, at his request, the insurer promises to pay the amount mentioned in the policy, it is in the first case a transfer by the mortgagor of his right to recover, and in the second a promise by the insurer to pay the indemnity which will become due under the contract in the same contingency of a loss happening from the risk insured against, and subject to all the conditions of the policy. I cannot appreciate the distinction which has been made between a transfer accepted subject to the conditions of the policy and one accepted without this being expressly mentioned. The conditions are attached to the claim, and the transfer of the claim is a transfer of the claim with all its conditions whether so expressed or not.

I would therefore agree with those who cannot find a distinction between the transfer of the policy, or the transfer of the amount mentioned in the policy, and the promise by the insurer to pay the loss to a vendee or to a mortgagee. In whatever form the transfer or the promise is made, I consider that the claim passes to the transferee with all the covenants of the policy and subject to all its conditions; that, in effect, it is the contract that is transferred.

But, whatever may be the difference elsewhere, there is no such difference here.

Dallez Rec. Alp., vol. 10, p. 608, says: "On appelle improprement délégation la dation en paiement d'une créance du débiteur que celui-ci fait à son créancier. *C'est un transport de la créance plutôt qu'une délégation de la personne, les effets en sont déterminés par la loi sur les cessions et transports.*"

Duvergier, vol. 2, No. 171: "La délégation imparfaite n'éteint pas la première créance, mais elle transmet la créance du débiteur, c'est une véritable cession qui en est faite."

Troplong vo. Priv. et Hyp. No. 344 3 al. et 5 al. Idem No. 370. Demolombe Vol. 28, p. 220. Guyot Rep. Vo. Délégation. Renusson de la subrogation ch. 2, Nos. 9 et 10. Loyseau de la garantie des rentes, ch. 3, No. 8, all take the same view as to the effect of a délégation.

Pouget, Dict. des Assurances vo. Transport, says:

"Lorsque l'emprunteur délègue au prêteur l'assurance qu'il a à recevoir de l'assurance en cas d'incendie de l'immeuble hypothéqué, ce *transport* doit sortir son effet." The word *déléguer* is here used as being synonymous of *transporter*.

By a transfer a creditor substitutes another person in his place to receive what his debtor owes him. In the delegation the creditor directs his debtor to pay what he owes him to another person whom he substitutes in his place to receive it. The difference is in the form of the contract, and we might almost say in the form of the expressions used only.

Let us suppose that A is the creditor of B for a sum of $100 and the debtor owes the same amount,—they all three join in the same deed, and A directs B, his debtor, to pay the sum which he owes him to C, his creditor. B being present promises to do it. This is a delegation by which the sum due by B to A is transferred to C, who is thereby substituted in the rights of A to receive it.

If A instead of directing B to pay C the sum of $100 which he owes him, should substitute C in his place to receive this sum of $100 which B owes him, and B, being present, accepts this transfer and thereby becomes the debtor of C instead of being the debtor of A as he was before the transfer, who could pretend that there was the slightest difference in the effect of those two contracts, as far as the transfer of the claim from A to C is concerned, or as regards the new relations created between B the debtor and C his new creditor. Yet in the one case there is a delegation and in the other there is a transfer of the claim, the form of the two being alone different. It is quite immaterial to the validity of either contract whether the three parties have joined in the same deed or whether the contract has been formed between them by separate and successive deeds.

A delegation includes a transfer, and has all its effects, although a transfer may

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not have all those of a delegation. Therefore whether the transferor uses the expressions, I transfer this insurance or this policy of insurance, or the amount mentioned in this policy, or I request the insurer to pay this insurance or the amount of this policy or the loss, if any, under this policy, the effect is the same. It is the claim, subject to its conditions, in other words it is the contract, such as it is, at the time the conveyance is made, that is, transferred.

We have now to consider what is the effect of such a transfer according to the rules applying to insurances.

The contract of insurance has this peculiarity, that it is a contract of indemnity. The insurer for a consideration promises to indemnify another person who is called the *insured*, against the loss from certain risks, &c. (Art. 2468, C. C.)

A person can acquire an interest in an insurance policy, either by insuring in his own name, or by a transfer of a policy issued in the name of another; but, in either case that person must have an interest in the object of the insurance, otherwise it would be a wager or a gaming transaction prohibited by law, as being against public policy. (Art. 2472, 2480, 2482, C. C.)

The interest of the party insured must exist, both at the time the insurance is made, or the policy is transferred, and at the time of the loss (Art. 2472, 2475, 2480, 2482, and Saddler's Company v. Badcock, 2 Atk. 554); and although the transferor might have retained an interest in the objects insured, and might have suffered a loss by their destruction, the assignee cannot recover, if at the time of the loss he has parted with his own insurable interest, any more than if he had insured in his own name. This is without difficulty in Lower Canada, where the maxim "*on ne plaide pas par procureur*" prevails. Art. 19 C. C. P.

Therefore, an action by a mortgagee alleging the transfer of a policy, and that the mortgagor had suffered a loss by the destruction of the property insured, without alleging that he the mortgagee, has himself suffered a loss, would be demurrable; while a declaration under the same circumstances, containing an allegation of a loss to the mortgagee to the extent of the amount claimed, would be sufficient in law, without any allegation that the mortgagor had himself suffered any loss. (Park v. Phœnix Insurance Company, 19 U. C. Q. B. 110).

What the assignee is entitled to recover is an indemnity for his own loss, and not an indemnity for the loss suffered by the party originally insured.

If A sells his property to B, and at the same time transfers his insurance policy without the consent of the insurer, and the property is afterwards destroyed, neither A nor B can recover. As to A, he has ceased to have any interest in the object insured, and therefore the policy has become void as to him, and B has acquired no right because the insurer has not consented to the transfer. But if the insurer has accepted the transfer or consented to it, B will recover not on account of the transfer by A, but by virtue of the consent of the insurer to continue the insurance, and to be bound towards him to the extent of his interest, as he was before the transfer bound towards A to the extent of his own interest. By this consent of the insurer a new contract has been formed,

and the policy which applied to the interest of A in the property now applies with all its conditions to the interest of B. A has ceased to be the insured, and by a new contract B has become the insured party. All the conditions of the policy now apply to him as they applied to A, and if he entered into another insurance on the same property without the consent of the insurer on the first policy, he would undoubtedly lose the benefit of this policy, as A would have done if, while he held the property, he had effected another insurance. This new contract cannot be affected by any act of A, nor by his omission of giving the necessary notice or proof of loss. It will be sufficient if these are furnished by B, and that is now generally admitted. (Cornell v. Leroy, 9 Wendell, N. Y. Rep. 163. Stanton & Home Insurance Company, decided by this Court, 21st June, 1879.)

The first ground of the judgment of the Court below, that the plaintiffs cannot recover because Farrar has not proved his losses in proper time, is therefore wrong. It was sufficient to prove that the Blacks had suffered a loss.

The Art. 2576 of the Code does not restrict this rule to the case of an actual sale, for it uses the terms "transfer of interest;" any transfer of interest whether by sale or otherwise would come under its provision, and there is no good reason why the same rule should not apply to a transfer of a portion of the interest of the insured, as well as to the whole, provided the transfer be made with the consent of the insurer. If so, why should this not apply to the conveyance of a life interest, to a lease for a term of years, a *bail emphytéotique*, a sale subject to an equity of redemption or to an *hypothèque*?

An *hypothèque* is a real right affecting the property, and in virtue of which the creditor may cause it to be sold in the hands of whomsoever it may be, &c. (Art. 2016, C. C.)

Boulay-Paty, Traité des assurances, p. 62, says:

"Tout constitution d'hypothèque est une aliénation éventuelle de la propriété hypothéquée."

If the hypothèque is an alienation of a portion of the rights of property of the proprietor, why should not the consent of the insurer, or his promise to pay the loss to the hypothecary creditor, who by his hypothèque has acquired an insurable interest in the property insured, have the same effect to convey the insurance from the interest of the mortgagor to that of the mortgagee, as in the case of a total or partial sale of the property the transfer of the policy has the effect of conveying the insurance from the interest of the vendor to that of the vendee?

When the meaning of the parties in a contract is doubtful, or when a clause is susceptible of two meanings, it is a rule applying to all contracts, that the common intention of the parties must be determined by interpretation rather than by an adherence to the literal meaning of the words of the contract, and the language used is to be interpreted in that sense, in which it may have some effect, rather than in that in which it will have none. (Arts. 1013 and 1014, C. C.).

We have already seen that the transfer of the contingent money claim, which under a policy of insurance belongs to the party insured, can be of no avail to a transferee who has no insurable interest in the property insured, since he could not claim the indemnity due to the transferor, and cannot

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in any case claim but his own indemnity to the amount of his own loss.

The Code (Art. 2482, 2483, and 2576) expressly authorizes the transfer of a policy of insurance, and does not speak of the transfer of the indemnity, or claim of the party insured, and no doubt because these terms only apply to a transfer made after the loss has happened, when such a transfer is governed by the rules applying to the conveyance of all money claims and not by those applying to the contract of insurance.

The transfer to the Blacks of the contingent money claim of Farrar would have had no effect, while a transfer of his policy from his interest to theirs would have been a valid transaction.

The parties must therefore have intended to make this valid contract when the company agreed to pay the insurance to the Blacks, and not the nugatory contract of transferring a contingent indemnity which the transferees could never obtain.

Farrar was by his contract bound to insure and to transfer the insurance to the other appellants. In effecting the insurance with the respondents, he was acting as the agent of his creditors, John and Henderson Black, as well as in his own name, and the policy issued by the respondents must be considered as having been made at the request of the two Blacks and at the request of Farrar, and to have the effect of securing their separate interests as effectually as if two insurances had been effected, the one of Farrar being subsidiary to the other. In this view of the contract, which is the one the majority of the Court is disposed to adopt, all the conditions of the policy would apply to both the insured parties, and any violation of such conditions by either party, as the alienation of his interest or the effecting of a second insurance without the knowledge of the other and without the consent of the Company, would avoid the policy as regards his own interest, but not as regards the interest of the other party.

The majority of the Court also consider that, supposing that a second insurance by George W. Farrar could have annulled the first policy, as regards John and Henderson Black, the insurance effected by the McDonalds at their own request, in the name of their debtors, the sons of George W. Farrar, who were not, at that time, the owners of the property, was to secure the interests of the mortgagees only, and was not such an insurance as would defeat the claim of John and Henderson Black who had no notice of such insurance and could not prevent it.

The only other question is whether the objection that the appellants have not furnished a properly attested claim within the fifteen days mentioned in the conditions of the policy is a valid one.

The Code, Art. 2478, says:

"If it be impossible for the insured to give notice or to make the preliminary "proof within the delay specified in the policy, he is entitled to a reasonable ex- "tension of time."

The Courts have generally been disposed to look upon such conditions in the spirit in which the article of the Code was enacted, and they have not always insisted that the proof should be furnished within the delay, especially when this delay, as in the present case, was a short one of fifteen days.

Dill v. The Quebec Fire Insurance Co., 1 Revue de Leg. 113; Goodwin v. The Lancashire Insurance Co., 18 L. C. Jurist 1; Wiggins v. The Queen Insurance Co. 13 L. C. Jurist 141; Lafarge v. The Liverpool, London and Globe Insurance Co., 17 L. C. Jurist 237; Wilson v. State Fire Insurance Co., 7 L. C. Jurist 223.

Also Hutchinson v. The Niagara Dist. Mutual Fire Insurance Co., 39 U. C. Q. B. 483, and Mason v. Harvey, 8 Exch. 819 and 821.

An intentional or fraudulent non-compliance with this condition ought to be fatal. In this case, however, we find that the day after the fire the appellants applied to the agent at St. Johns for blank forms to make their claim. They were referred to the head office, at Montreal. They applied to the secretary of the company at Montreal, with whom they appear to have had some communication, within the fifteen days. Again we have the secretary writing to the agent of the Company at St. Johns, by whom he had been informed of the fire at the request of the appellants.

"Let us know the full particulars and the insurances on the pottery (meaning the property in question) to which we will attend as soon as possible."

Then it is proved that the Company joined the other insurances interested, and authorized the Royal Canadian Insurance Company to adjust the loss, and to apportion it between the several insurers. The majority of the Court finds in all these circumstances a waiver of any defect which might exist in the preliminary proof furnished by the appellants.

The judgment of the Court below will be reversed, and judgment will be for the appellants, John and Henderson Black, according to the conclusions of their declaration.

The following was the written judgment of the Court:—

"The court * * * considering by a deed of the 14th day of February, 1874, George W. Farrar, one of the plaintiffs and appellant, and George H. Farrar and Lucius E. Farrar hypothecated in favor of John Black and Henderson Black, the two other plaintiffs and appellants in this cause, a certain lot of land and buildings thereon situated in the Town of St. Johns, for the sum of $4000, currency;

"And considering that in and by the said deed it was covenanted and agreed that the said George W. Farrar and his co-debtors should cause the said real estate to be insured for $8,000, and should transfer the policy of such insurance to the said John Black and Henderson Black;

"And considering that in pursuance of said agreement the said George W. Farrar did, on the 3rd day of July, 1876, effect with the respondents an insurance on the said buildings for the sum of $1,800, for which the respondent issued an insurance policy on the said 3rd July, 1876, for said sum of $1,800, and that it is declared in the said policy that the loss, if any, shall be payable to J. & H. Black, the said John and Henderson Black, as mortgagees to the extent of their claim;

"And considering that the said insurance was so effected by the said George W. Farrar to carry out his undertaking to have the said buildings insured and the insurance policy transferred to the said John and Henderson Black to secure their interest as mortgagees;

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"And considering that the said declaration in the said policy, that the loss, if any, would be paid to the said John and Henderson Black, having been made at the instance and with the consent of the said George W. Farrar, amounted to a delegation of the amount of the said insurance, which delegation, being accepted, had in law the same effect as an accepted transfer of the said policy would have had as to all parties concerned;

"And considering that the contract of insurance is one by which the insurer agrees to indemnify the insured for the loss he may suffer by the risks insured against, and that under articles 2480 and 2482 of the Civil Code of L. C. wager policies are illegal, and a fire insurance policy pending the risk is not transferable except to a person having an insurable interest in the object of the policy;

"And considering that, as a consequence of the provisions of said articles, the contingent claim secured by an insurance policy is not transferable, and the only transfer allowed by law is a transfer of the policy itself from one party interested to another party acquiring the same interest, or from the interest of one party in the property insured to that of another party in the same property;

"And considering that in effecting the said insurance with the respondents, the said George W. Farrar was acting both in his own interest and in the interest of the said J. & H. Black, and as their agent, and that the policy issued by the respondents must be considered and held to be a policy issued in their joint interest, and to cover first the loss of the said J. & H. Black, if any, and secondly, the loss of the said George W. Farrar for any balance of the policy after payment of the loss sustained by the said John and Henderson Black;

"And considering by virtue of the delegation and transfer of the said policy, the said John and Henderson Black became the parties insured to the extent of their interest in the said buildings as mortgagees;

"And considering that the said George W. Farrar could, neither by a release of the said insurance, nor indirectly by any act of his, destroy or impair the rights and interests of the said John and Henderson Black in the said policy;

"And considering that the subsequent insurance on the said buildings was not effected by the said George W. Farrar, but by D. and E. McDonald to secure the payment of their interest in the said buildings as mortgagees; and that the same was so effected without the knowledge of the said J. & H. Black, and that such insurance, even if it had been effected by the said George W. Farrar, could not be considered a violation of the condition of the policy as regards subsequent insurances, and could not affect the right of the said J. & H. Black to recover the amount of their loss;

"And considering that it is in evidence that the said buildings were destroyed by fire on the 10th September, 1876, while the said policy was still in force, and that the said J. & H. Black had at the time of the said fire an insurable interest in the same as mortgagees to an amount exceeding that mentioned in the said policy;

"And considering that the said John Black and H. Black have given due notice of their loss, and have furnished a preliminary proof of the same within

a reasonable time, and as requested by the respondents, and that the said respondents have by their agents waived any right to complain of any delay in furnishing such preliminary proof;

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"And considering that the said John Black and Henderson Black are entitled to recover the amount of their demand, and that there is error in the judgment rendered by the Superior Court sitting at Montreal on the 31st of January, 1878;

"This Court doth reverse the said judgment of the 31st of January, 1878, and proceeding to render the judgment which the said Superior Court should have rendered, doth condemn the said respondents to pay to the said John Black and Henderson Black to the acquittance of the other plaintiff and appellant, George W. Farrar, the sum of $1,800, with interest from the day of service, and costs, as well those incurred in the Court below as on the present appeal, the honorable Justices Monk and Ramsay dissenting."

Judgment reversed.

Geoffrion & Co., for appellants.
E. Carter, Q. C., counsel.
Davidson & Monk, for respondent.
(S. B.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 17TH DECEMBER, 1879.

Coram SIR A. A. DORION, C.J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 106.

ANDREW B. STEWART ES QUAL.,
(Defendant in the Court below,)
APPELLANT;

AND

MICHAEL FARMER,
(Plaintiff in the Court below,)
RESPONDENT.

HELD:— 1. In cases where the Insolvent Act does not afford relief against an assignee, the remedy by ordinary suit is not taken away notwithstanding anything contained in Sect. 125 of the Insolvent Act of 1875; and therefore, where the assignee to an insolvent estate under the said Insolvent Act sold a portion of the insolvent's real estate, and the purchaser was sued by the neighboring proprietor by reason of a building which had been erected by the insolvent against said neighbor's wall without having acquired the right of *mitoyenneté*, the assignee was properly called in as *garant* by the purchaser; and this notwithstanding that the original action (which was maintained by the Court below) was apparently not well founded, inasmuch as the legal effect of the sale by the assignee was to discharge the property from the real rights which were the basis of the principal suit.

2. The effect of a condemnation *en garantie* against an assignee under the circumstances stated above is to give the plaintiff *en garantie* a claim against the insolvent's estate either to recover the price paid or a portion thereof, or to rank upon the estate for the indemnity awarded by the judgment.

SIR A. A. DORION, C. J. The respondent, Farmer, purchased from the appellant, as assignee to Edouard Payette's estate, a property situate in St. Ann's ward

Stewart et qual. and Farmer.

Being sued by Louis Tessier, who claimed to be the owner of the division wall on which Payette had erected his house, he called the appellant, his vendor, *en garantie*.

The latter did not appear. Farmer was condemned in the original action to demolish his house, or pay $134.70 with interest on this sum from 22nd October, 1875, also $50.84 for costs of a former action, with interest from the 18th of April, 1877, and costs of suit.

This judgment was rendered on the 28th February, 1878. On the 27th March following, the appellant was condemned to guarantee the respondent from the consequences of the judgment of the 28th February.

The appeal is from the judgment on the action *en garantie*, and the only question is whether the appellant, who is an assignee, could have been summoned in the cause as *garant*.

The appellant contends that, under sect. 125 of the Insolvent Act of 1875, he cannot be impleaded in any case before the ordinary tribunals; that all claims against an assignee must be urged by summary proceeding before a Judge or Court acting in insolvency.

He cites the case of Hutchins & Cohen, and Cohen & Whyte, in support of his pretension (15 L. C. J. 235), where it was decided by Judge Beaudry that an assignee cannot be summoned *en garantie*.

But in that case the act, out of which the *garantie* arose, was the act of the insolvent himself, and as the assignee could not be sued for the insolvent's debts it might perhaps, with some show of reason, be said that he could not be sued *en garantie*, because the *garantie* was a liability of the insolvent. We do not however express any opinion on this point.

In the present case, the liability, if any, is not the liability of the insolvent, but a liability created by the assignee himself, in his capacity of assignee. It is not a claim which could be proved against the estate under the provisions of the insolvent law (Sect. 80), and it is not a claim for which a Judge or Court acting under the insolvent law could grant any relief under section 125 of the Insolvent Act. The *garantie* may eventually result in a claim against the estate but not until the question of warranty has been decided, and this can only be decided in the original cause. Claims *en garantie* are not such as may be urged on a summary petition under section 125, for it is not a demand to compel the performance by the assignee of his duties, nor is it "*a remedy sought or demanded for enforcing any claim for a debt, privilege, mortgage or hypothec, lien or right of property upon, in or to any effects or property in the hands, possession or custody of any assignee*," which are the only cases provided by this section.

It has been held in Ontario that whenever the Insolvent Court was not competent to give adequate relief, the ordinary remedy before the other tribunals was not taken away. (Henderson v. Kerr, 22 Grant 91; Gordon v. Ross, 1 U. C. L. J. N. S. 106, 11 Grant, 124; Cameron v. Kerr, 23 Grant 374. See also the English cases of Stone v. Thomas, L. R. 5 Chancery Appeals, 219; Coulthurst v. Smith, 29 L. T. N. S. 243; Ibidem 714.

It is evident that sect. 125 was only intended to give a summary remedy in

cases wherein the ordinary processes would entail additional expenses on the estate, and not to deprive a party of his remedy in the usual form, when none could be afforded to him under that section.

Without, therefore, expressing any opinion as to some of the decisions referred to, it seems that from the terms of the act, as well as from the general tendency of these decisions, the rule may be laid down, that the ordinary remedy is not taken away when the Insolvent Act cannot afford an adequate remedy, and that as the Insolvent Court cannot determine a question of *garantie*, the action *en garantie*, whenever it arises, is not taken away by the Insolvent Act.

The next question is, whether the circumstances of this case can give rise to an action *en garantie*.

The Insolvent Act (sect. 76) provides that sales of immoveable property by an assignee in insolvency have the same effect as sales made by the sheriff.

Under Art. 708, C. C. P. a sale by the sheriff is without any warranty as to the contents of the property sold. It discharges the property from all real rights not mentioned in Art. 710 nor in the conditions of the sale. (Art. 711.)

The claim of Tessier for the *mitoyen* wall, not being one of those mentioned in Art. 710 C. C. P., nor in the conditions of sale, would seem to have been discharged by the sale made by the assignee. The Court below did not, however, think so, and it maintained Tessier's action.

The respondent was entitled to be protected against the risk of such an adverse judgment, and it is on that ground that he has instituted his action *en garantie*. By this action he in effect says to the appellant, you have, as assignee to Payette's estate, sold to me a lot of land with a house thereon erected. I am now sued by a neighbour to demolish part of this house, you are bound to protect me against this trouble, and therefore I call you *en garantie*. It does not matter whether the principal action is well founded or not. If it is not well founded, it is for the assignee who is the vendor to show it, and not for the purchaser.

But, it may be said, the assignee only sells as the sheriff would do, and as there can be no action *en garantie* against the sheriff, unless for his personal wrong, there can be none against an assignee. It is true that there would be no action *en garantie* against the sheriff in such cases, but the sheriff is only a ministerial officer, while the assignee is vested with the property he sells. He sues in his capacity of assignee for the price of it, as well as for the other assets of the estate. He has therefore a representative quality which the sheriff has not. It may be asked, what would be the effect of a judgment declaring the assignee to be the *garant* of the purchaser? The effect would be to give the purchaser a claim against the estate either to recover back the price paid or a portion of it, or to rank upon the estate for the indemnity awarded by the judgment.

Taking the view that the sale by the appellant as assignee gives rise to a claim *en garantie*, and that section 125 of the Insolvent Act of 1875 affords no adequate relief for such a case, we must hold that the action *en garantie* is the proper remedy in this case. The judgment of the Court below is, therefore, confirmed with costs.

Abbott, Tait, Wotherspoon & Abbott, for appellant.

Doutre & Doutre, for respondent.

(J.K.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 17th DECEMBER, 1879.

Coram Sir A. A. DORION, C.J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 179.

LA COMPAGNIE D'ASSURANCE DES CULTIVATEURS,
(*Defendants in the Court below,*)
APPELLANTS;

AND

GRAMMON,
(*Plaintiff in the Court below,*)
RESPONDENT.

HELD:—Where an Insurance Company, without any reservation, accepts a promissory note of the insured for the amount of the premium, payment whereof is acknowledged by the policy to have been received, the failure of the insured to pay the note at maturity does not affect the validity of the insurance.

The judgment of the Court below (St. Hyacinthe, Sicotte, J., 8th July, 1878,) was in these terms:—

"La cour, etc.....

"Considérant qu'il est prouvé par le contrat et police d'assurance, octroyé en la forme ordinaire et permise, le 22 Décembre, 1875, que la défenderesse, en considération de la somme de $4.30, qu'elle reconnut avoir reçue, assura le demandeur contre les pertes et dommages par le feu, jusqu'à concurrence du montant de $430, sur une maison indiquée plus au long dans l'application évaluée à $300, et son contenu, évalué à $130, pour trois ans;

"Considérant qu'il est prouvé que le demandeur a souffert des pertes et dommages par le feu qui a brûlé et détruit, le 14 mai, 1876, la maison susdite et son contenu, sur et de la somme de $400;

"Considérant que le demandeur s'est conformé à tout ce qui était requis de lui, pour informer la défenderesse de cette perte, et obtenir d'elle l'indemnité qu'elle lui devait;

"Considérant que le contrat d'assurance est réglé d'une manière finale et absolue par l'affirmation faite dans la police, par la dite compagnie d'assurance, et qu'elle ne peut être admise à prouver que cette affirmation est fausse, et détruire cet acte par preuve verbale;

"Considérant que la prime peut être payée par toute valeur acceptée par l'assureur;

"Considérant que la preuve constate que le demandeur a agi de bonne foi, et que la défenderesse a connu les faits de l'agent employé par elle pour effectuer l'assurance avant l'octroi de la police;

"Considérant que le demandeur a prouvé sa demande, et que la défenderesse est mal fondée dans ses défenses, condamne la défenderesse à payer au demandeur la somme de $400, avec intérêt du 28 Octobre, 1876, jour de l'assignation, et les dépens distraits aux avocats du demandeur."

Sir A. A. DORION, C.J.:—L'appelant a assuré les bâtisses de l'intimé pour $430 à raison d'une prime de $4.30 qu'elle reconnait par la police avoir reçu de l'intimé.

Compagnie D'Assurance des Cultivateurs and Grammes.

Le 14 mai 1876 les bâtisses assurées ont été détruites par un incendie, et l'intimé réclame le montant de la perte qu'il a soufferte.

L'appelante a plaidé que d'après une des conditions de la police, un assuré ne peut recouvrer la perte qu'il a faite, s'il n'a payé sa prime d'assurance ; que l'intimé n'a jamais payé sa prime d'assurance, mais que le 11 de décembre 1875, il a donné son billet à trois mois pour $5.80 pour sa prime, et qu'il n'a jamais payé ce billet, quoiqu'il en ait été souvent requis.

La Cour Inférieure a jugé que l'appelante, ayant reçu sans aucune réserve un billet en paiement de la prime, et ayant [illegible] simple, elle n'avait plus de créance pour la prime dont [illegible] paiement, et a rendu le jugement pour le montant de la perte [illegible] l'intimé, moins le montant du billet.

Il est prouvé que, loin de répudier son obligation [illegible] de la police, l'appelante entendait au contraire tenir l'intimé responsable [illegible] montant de son billet, car quelques jours avant l'incendie, des instructions avaient été données pour réclamer de l'intimé le montant de son billet, et l'action était même préparée lorsque l'incendie a eu lieu. Mais indépendamment de cette circonstance, nous croyons, avec la Cour Inférieure, que l'admission contenue dans la police, que la prime a été payée, indique suffisamment que le billet a été accepté comme un paiement effectif, qui ne peut plus être contesté par la compagnie appelante, dont le seul recours est pour être payé du billet de l'intimé.

Le jugement doit donc être confirmé.

Judgment confirmed.

Loranger, Loranger, Pelletier & Beaudin, for appellant.
Hon. F. X. A. Trudel, for respondent.
(J.K.)

SUPERIOR COURT, 1879.

MONTREAL, 20TH DECEMBER, 1879.

Coram MACKAY, J.

No. 1677.

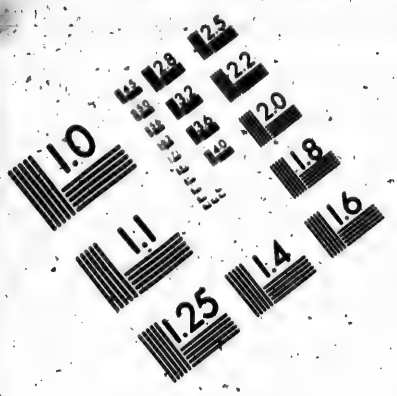
Legge vs. *Legge* Jr., & *Simpson*, plaintiff *par reprise d'instance*.

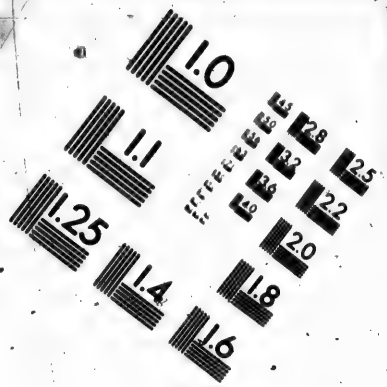
HELD :—That the appointment as curator to an interdicted person of a party residing in Ontario is illegal, and will be annulled and set aside, in a suit *en destitution* by a daughter of the interdict, even if she be not dependent on her father for support, and a new curator, resident within this Province, will be ordered to be appointed in due course of law.

This was an action *en destitution de curatelle*, by a daughter of Charles Legge, interdicted for cause of insanity, on the ground that the curator, Joshua Legge the younger, resided at the time of and ever since his appointment at Gananoque, in the Province of Ontario.

The plaintiff, in her declaration, also alleged that she was dependent on her father for support, and that she had no means of compelling the defendant, who lived out of the jurisdiction of the Court, to contribute to such support.

During the pendency of the action the plaintiff married, and her husband





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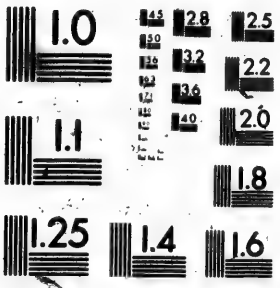

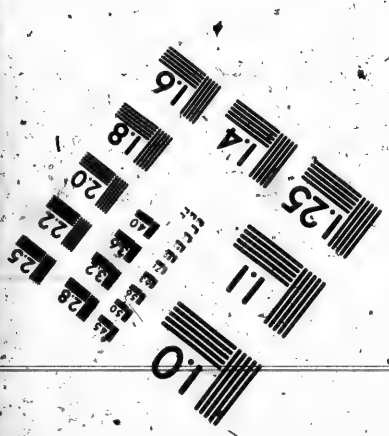

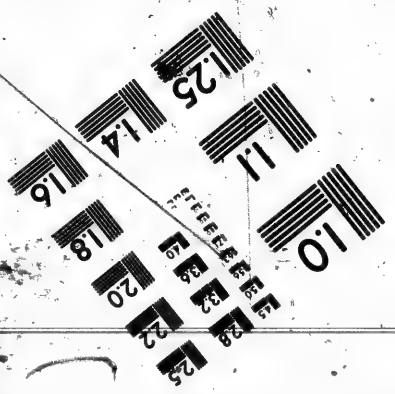

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Legge vs. Legge and Simpson.

intervened and took up the *instance*, for the purpose of authorizing his wife (separated from him as to property) to continue the suit.

After the husband had thus intervened, the defendant fyled a plea, to the effect that the judge knew the curator to be a resident of Ontario when he appointed him, and that the plaintiff, by reason of her marriage, had ceased to be dependent on her father for support.

To this plea the plaintiff demurred, on the ground that the reasons assigned in the plea were no bar to the plaintiff's right of action.

On the 10th December, 1879, the Court (Mackay, J.) sustained the demurrer and dismissed the plea. And the case being afterwards inscribed for final hearing on the merits, judgment was rendered, rescinding, annulling and setting aside the defendant's appointment, and ordering the appointment of a new curator, resident within this Province: the judgment declaring, "that said Joshua Legge the younger resides out of Quebec Province, and did when appointed, and ought, in consequence, to be, even now, removed from his office of curator, referred to in the plaintiff's declaration." Defendant's appointment as curator set aside.

Bethune & Bethune, for plaintiff and plaintiff *par reprise d'instance*.

Kerr, Carter & McGibbon, for defendant.

(S. B.)

SUPERIOR COURT, 1880.

MONTREAL, 3RD MARCH, 1880.

At *Enquête* sittings.

Coram PAPINEAU, J.

No. 30.

Devine et vir *et al.* vs. *Griffin*.

HELD:—That after the *enquete* has been closed, and the case finally heard on the merits, the case has ceased to be on the *rôle d'enquete*, and, consequently, the granting of a motion to discharge the *délibéré* and allowing the plaintiffs to re-open their *Enquete* necessitates the re-inscription of the case on the *rôle d'enquete* before the plaintiffs can proceed to the examination of their witnesses.

The *enquête* of the plaintiffs and defendant having been closed, the case was inscribed on the *rôle de droit* and finally heard on the merits.

While the case was under advisement, the plaintiffs moved, for special reasons assigned in an affidavit fyled in support of the motion, that the *délibéré* should be discharged and the plaintiffs be allowed to re-open their *enquête*.

This motion was granted, and, thereupon, the plaintiffs served a notice on the defendant that they would proceed with their *enquête* this day. The defendant's counsel objected to the examination of witnesses by the plaintiffs, on the ground that the case was not, under the circumstances, on the *rôle d'enquête*.

PER CURIAM:—When once the *enquête* has been closed on both sides, and the case has been inscribed for final hearing on the merits, the case has ceased to be on the *rôle d'enquête*. Any subsequent permission, therefore, to re-open the *enquête* necessitates a re-inscription of the case on the *rôle d'enquête*, with the usual notice of eight days to the opposite party. I order, consequently, that the plaintiffs cannot presently proceed to the examination of their witnesses.

Keller & McCorkill, for plaintiffs.

Bethune & Bethune, for defendant.

(S.B.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 22ND DECEMBER, 1879.

Coram Hon. SIR A. A. DORION, Ch. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 174.

ARCHIBALD ET AL., APPELLANTS;

AND

BROWN ET AL., RESPONDENTS.

HELD:—That where several persons, trustees of an insolvent estate under a deed of composition, which gave them no power to draw or accept bills, signed promissory notes with the words "Trustees to estate C. D. Edwards," after their signatures, they were personally and jointly and severally liable.

This was an appeal from the judgment of the Superior Court at Montreal (Johnson, J.,) reported in the 22nd L. C. J., p. 126.

It may here be remarked that the judgment of the Court of Review, in Brown vs. Kerr, referred to on page 127 of said report, was confirmed by the Court of Queen's Bench, on the 14th December, 1878. (23rd L. C. J., p. 227.)

SIR A. A. DORION, Ch. J. (*dissentiens*):—

The respondents (plaintiffs in the Court below) claim by their action the amount of five promissory notes, signed by the appellants as trustees to the estate of C. D. Edwards. These five notes, which were payable to the order of C. D. Edwards, were endorsed by him to the respondents.

In August, 1875, before the date of the notes, Edwards, who carried on business as a safe manufacturer, became insolvent, and made an assignment of his estate to Arthur M. Perkins, an official assignee. He subsequently entered into a deed of composition with his creditors, under the provisions contained in sections 59 and 60 of the Insolvent Act of 1875.

By this deed of composition, which was approved of and confirmed by the Court sitting in matters of insolvency, Edwards agreed to pay to his creditors the full amount of their respective claims by instalments extending over a period of thirty-six months. As a security for the payment of the notes given for each instalment, the estate was transferred to the appellants, who were to hold it upon the trust, that, if all the composition notes were paid as they became due, the appellants would reconvey the estate to Edwards, but in case he failed to pay any of the instalments, the assignee was to resume possession of the estate for the benefit of the creditors. In the meantime Edwards was to carry on his business under the supervision and control of the trustees, which supervision and control were to include the *purchasing of goods, incurring liabilities*, the sale of goods on credit, and the discharging and compromising of debts due to the estate.

The parties to this deed were Edwards, a majority of his creditors, the assignee to the estate and the three trustees, two of whom, Archibald and Currie, were also creditors. Campbell, the other trustee, was not a creditor.

Edwards having resumed business under the composition deed, purchased a

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quantity of coal from the respondents for which he gave his own notes. Brown, one of the respondents, after keeping the notes for eight or ten days, told Edwards that he could not have them discounted, and asked of him to get the notes of the trustees, which he might use. Brown also asked Archibald, one of the appellants, as a favor to give him the notes of the trustees, as he could not use those of Edwards.

At enquête, Edwards was examined as the respondents' witness, and on being asked if, when he first applied to Brown to sell him the coal, the latter did not refuse to sell it to him personally, he answered:

"I do not know that he refused, but I referred to the deed, and informed him, "at Mr. Kerr's advice, it was a claim on the present defendants (the appel-"lants) as trustees."

Further on Edwards is asked: "It was you who made the arrangements between the plaintiffs and the other defendants?

"Answer. The notes passed through my hands, and bear my indorsation.

"Question. And it was represented to him that they were responsible?

"Answer. Certainly.

"Question. Personally?

"Answer. That I cannot say; they were as trustees, but I cannot say personally."

It was under these circumstances that the five notes were given. They are all in the same form as the following:

$231.67. Montreal, 12th October, 1876.

Four months after date, we promise to pay to the order of C. D. Edwards, at the Bank of Montreal, two hundred and thirty-one 67-100 dollars, for value received.

H. ARCHIBALD,
W. CURRIE,
R. A. CAMPBELL. } Trustees Estate C. D. Edwards.

The appellants allege that they only signed the notes as trustees; that Edwards having failed to fulfil his obligations to his creditors, the assignee has resumed possession of the estate; that they are not personally responsible, and that the respondents have their recourse against the estate as provided for by section 59 of the Insolvent Act.

The Superior Court held that the appellants were personally liable, and has condemned them jointly and severally to pay the amount demanded.

There is nothing on the face of these notes from which a personal liability can be inferred. They are signed in the usual way in which an agent contracts so as not to render himself personally liable, that is, by adding his representative capacity to his signature. (See observations of Archibald, J., in Gadd vs. Houghton, L. R. 1 Exch. 357.) To attach a personal liability to the appellants on these notes, the qualifying words accompanying their signature must be considered as of no meaning and effect. The evidence adduced by the respondents clearly establishes that not only the appellants did not intend to assume a personal liability, but that the respondents did not expect them to do so, for they only requested them to sign the notes as representing the Edwards estate, well

knowing what connection they had with that estate. The evidence also shows that the appellants had no personal interest in the matter, except that two of them were creditors of the estate, and that they signed the notes to accommodate the respondents, and without any obligation on their part.

Under such circumstances the appellants ought certainly to have as favorable an interpretation put upon their contract as the law will allow.

The rule laid down by the Civil Code, Art. 1715 and 1717, is that one who acts in the name of another is not personally liable to those with whom he contracts, even when he exceeds his authority, if he has given sufficient communication of his powers.

This same rule is well expressed in Art. 2982 of the Louisiana Code, as follows:

"The mandatary (mandataire) is responsible to those with whom he contracts only when he has bound himself personally, or when he has exceeded his "authority without exhibiting his powers."

Troplong, du Mandat, No. 510, says;

"Le mandataire est un intermédiaire, il est *nudus minister*; les actes qu'il "fait avec les tiers en cette qualité ne réfléchissent pas sur lui, il n'en est pas ga- "rant à l'égard de ces tiers. *Lors même que le mandataire a excédé les fins de sa "procuration, s'il est prouvé que les tiers ont eu une suffisante connaissance des "termes du mandat, ils ne doivent s'en prendre qu'à eux-mêmes d'avoir été plus "loin qu'il ne le fallait et le mandataire n'est pas tenu envers eux.*"

Idem, No. 776..... "Le mandataire qui agit *nomine procuratorio* n'entend "contracter et ne contracte, en effet, aucune obligation personnelle avec les tiers; "il se donne pour ce qu'il est un *nudus minister*."

Dalloz, Dict. Vo. Mandat, No. 378: "S'il existe des doutes sur l'existence "de la garantie promise, c'est au tiers qui l'invoque à en faire la preuve. De "même ce serait à lui à prouver que le mandataire ne lui a pas donné connais- "sance du mandat. Dès qu'il a traité avec le mandataire en cette qualité, la pré- "somption est qu'il s'est fait communiquer son pouvoir."

Delvincourt, Vol. 3, p. 241, note 6; Rolland de Villargues vo. Mandat, Nos. 168, 169, 170, and Pont du Mandat, No. 1057, hold the same doctrine.

These authorities sustain the principle that a party acting *nomine procuratorio* is not responsible unless he has bound himself personally by the terms of the contract, or that, having exceeded his authority, he has not communicated his powers, the proof in either case lying with the party with whom he has contracted.

In the present case the appellants have signed the notes in their representative capacity *nomine procuratorio* by adding to their signatures the words "Trustees estate C. D. Edwards." These words are susceptible of no other interpretation but that the appellants did not intend to bind themselves personally.

But it is contended that although the notes by themselves imply no personal liability on the part of the appellants, yet their liability results from the fact that they had no authority to bind the estate, and that in reality there are no responsible principals to whom the respondents can look for their payment.

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Admitting for the moment that the appellants had no sufficient authority to bind the estate, and that there are no responsible principals, under the articles of the Code and authorities already cited, the respondents could have no recourse against the appellants, since they have accepted the notes with a full knowledge of the authority under which the appellants were acting. There was no deception on their part, and in this view of the case the result would appear to be the same, whether the contract is to be governed by the French or by the English law.

Smith on Mercantile Law, in the section in which he speaks of the rights of third parties against the agent, says:

"The rule itself seems to be one of evidence, and all cases falling under it to "be reducible to the question, *To whom was credit given?* For it seems on the "one hand, that if a party choose to give credit to irresponsible persons of any "description acting by their agent, and it is manifestly intended that the agent's "credit shall not be pledged, in such a case the agent will not be responsible; "while on the other hand it is clear that, if the agent contracts for an irrespon- "sible employer, a strong presumption will arise that he meant to pledge his own "credit, and that the party dealing with him meant to accept it, unless indeed "he be a government or public officer acting in his public capacity."

Why is this distinction between a contract by a public officer acting in his public capacity and one by an ordinary agent? Because no private person can be *presumed to have assumed any responsibility for the contracts of the government.* The decision in each case must, therefore, rest upon the evidence and the strength of the presumptions as to the intention of the parties. The only difference between the French and the English rule seems to be that, under the French, the party acting in a representative capacity is always presumed not to intend to bind himself personally, while in England a party acting for an irresponsible principal is presumed to assume a personal liability. But in both systems this legal presumption does not exclude evidence of the intent of the parties to the contrary, for it is a rule everywhere that a contract must be interpreted according to the common intent of the parties (arts. 1013 and 1019 of the Civil Code).

In Lewis *vs.* Nicholson (18 C. B. Rep. 500), Lord Campbell in giving the judgment of the Court, said:

"I think in no case where it appears that a man did not intend to bind him- "self, but only to make a contract for a principal, can he be sued as principal "merely because there was no authority."

In the same case Erle, J., expressed the same view in still stronger language.

"I know of no case (said the learned judge) in which what is properly called "a contract is made by law contrary to the intent of the parties."

This principle is particularly applicable to cases of agency (Story on Agency, §265), and was strongly dwelt upon by the Court in the case of Eastbrooke & Barker, L. R. 6 C. P. 1, cited at the Bar.

The rule that an agent who has communicated his authority is not responsible was acted upon by the Court of Cassation in a case of Levacher & Autres *v.* Bolle (Sirey, 1811, 1—551) which in most particulars affords a striking analogy to the present one.

A banker by the name of Alexandre contracted a nominal partnership with his nephew. The business was carried on by them under the name of "Alexandre, Oncle et Neveu."

The uncle died leaving an encumbered estate which was accepted *sous bénéfice d'inventaire.* The creditors by a voluntary agreement appointed from among themselves three commissioners to watch over their interest in the winding-up of the estate. These commissioners made a transaction with Bolle, a creditor, who had not concurred in their appointment, by which they bound themselves, acting as commissioners, to pay him 3,800 francs, in two instalments, for a claim of 4,000 francs which he held against the estate of the firm. The first instalment was paid, but, before the second became due, a judgment of the Court declared that there was no such estate as that of "Alexandre, Oncle et Neveu," and that the commissioners had been improperly appointed. Bolle sued the three commissioners as being personally liable for the second instalment of his debt, but the Cour de Cassation, reversing the judgment of the Court below, dismissed the action.

This arrêt is cited with approbation by Favard de Langlade, Vo. Faillite, § 5 No. 6, who says:

"Les agents et syndics sont les mandataires de la masse des créanciers, ils ne "s'obligent pas par leurs actes et en leur nom personnel qu'autant qu'un manda- "taire ordinaire s'engagerait lui-même en pareil cas. Lors donc qu'ils ont donné "à la partie avec laquelle ils ont contracté une connaissance suffisante de leurs "pouvoirs, ils ne sont personnellement tenus à aucune garantie pour ce qui a été "fait au-delà, à moins qu'ils ne s'y soient soumis personnellement. D'où il suit "que *s'ils ont été indument nommés parce que la masse au nom de laquelle ils "ont agi n'existait pas*, ils ne sont ni garants, ni responsables de l'exécution du "traité qu'ils ont souscrit."

Let us now examine whether it is true that a party cannot act in a representative quality without incurring a personal liability, when he has no responsible principal, and also whether the appellants had sufficient authority to act as they did and to bind the estate of Edwards.

Pothier, Obligations, No. 126, mentions the case of a contract by a curator to a vacant estate. The curator is not personally liable, yet there is no principal to whom the creditor can look to enforce his contract. In such a case, the curator only binds the property in his hands belonging to the vacant estate, or, as Pothier says, "*the fictitious person of the vacant estate.*" The same may be said of the curator to the property of an extinct corporation, of the presumptive heir, or of the legatee who has accepted a succession or a legacy *sous bénéfice d'inventaire*, of a guardian, receiver, or sequestrator. When acting as such they incur no personal liability, but only bind the property of which they have a temporary possession.

The assignee who, in winding up an insolvent estate, incurs a liability in reference to such estate, neither binds himself personally nor the creditors. We had an instance of such liability in the case of Stewart and Farmer,* decided during the present term, and where it was held that an assignee who sold a house with a right of *mitoyenneté*, while the wall belonged altogether to the adjoining

* 24 L. C. J. 79.

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proprietor, was *garant*, and, as such, bound to indemnify the purchaser. This judgment, however, only affects the estate and not the assignee, nor the creditors personally.

The position of the appellants is that of the several agents just mentioned. With the consent of all parties interested, and with the sanction of the Court, the Edwards estate was placed in their hands for safe-keeping. They are the *guardians* or sequestrators of the estate in the interest of the creditors and of the insolvent, with power to allow the insolvent, for carrying on his business, to create debts, binding upon the estate and proveable in Insolvency, under section 59, in case the estate should revert to the assignee, as if these debts had been created before the assignment. The estate was still that of Edwards, but he could neither dispose of it, nor create any debts affecting it, except under the control and superintendence, and with the concurrence of the appellants. They were to act as his counsellors in the interest of the creditors, and by their assent the estate became liable for the debts which Edwards chose to incur in the carrying on of his business.

Let us suppose that, instead of giving promissory notes, the appellants had in their capacity joined with Edwards in giving an order for the coal he required, they at the same time communicating to the respondents the authority under which they were acting, would not the only fair interpretation of such an order be that the appellants had signed it as trustee merely to give the insolvent sufficient credit to buy the coal by pledging the property of his estate in their hands? Instead of giving the order for the purchase, they have, after the purchase was made, acknowledged that it was for the benefit of the estate, and ratified the purchase and consented that it should bind the estate. That they have done so by giving promissory notes does not alter the question. Their signature as trustees on the notes can have no other effect but that which it would have had if the same signature had been affixed to an order for the coal.

The celerity required in mercantile transactions does not admit of long formulas. Contracts in the forms sanctioned by commercial usage must, nevertheless, be interpreted, as more extended ones are, according to the intent of the parties. The respondents have cited the case of Kerr & Brown in support of their pretensions. But that case, of which a rather condensed report is given in the 23 L. C. Jurist, 227, was decided according to what the Court conceived to be the clear intention of the parties, as indicated by the contract they had entered into.

In this case that intent is altogether opposed to any personal liability of the trustees.

The case of Redpath *vs.* Wigg, L. R. 1 Exch. 335, cited by the learned counsel for the appellants, is a case in point. In that case the inspectors, under a deed allowing the debtor to carry on, under their control, his business for a period of six months, ordered goods from the plaintiff which had been purchased by the debtor previous to his insolvency. They signed their names "for C. J. M. & Co.," which was the name under which the debtor was carrying on his business. It was held that the inspectors were not personally liable. Willes, J., in rendering the judgment, said: "Nor can the plaintiff justly complain of this

"result. The form of the order gave him notice that Man & Co. were his "customers, and to that firm, *and to the trust for payment of current expenses "he must be content to look.*"

The only difference between that case and the present one is that there the inspectors had given an order for goods, signing their names "for C. J. M. & Co.", while here the trustees have given notes after the goods were purchased, signing their names with the addition, trustees for Estate C. D. Edwards. By striking out the word "estate" the cases are identical. The addition of this word does not alter the case, for signing as trustees of the Estate of C. D. Edwards was really signing for C. D. Edwards, to whom the estate still belonged, and for whom they were holding it in the event of his fulfilling his obligations. In the view I take of the case the trustees merely signed these notes to give to the respondents a claim on the estate, which they could not obtain by the mere signature of Edwards, and the very form of the notes is an indication of what the parties meant.

If there should be any doubt about the English law, there can be none under our Code that the appellants are not responsible personally, and as it is by the rules of the Code that this case ought to be determined, I would reverse the judgment, and dismiss the action. As we are only two of that opinion, the judgment condemning the trustees to pay will be confirmed.

MONK, J., also *dissented*, and briefly stated that he entirely concurred in the reasons assigned by the Chief Justice.

CROSS, J. This action was instituted on the 1st of October, 1877, by the mercantile firm of A. R. Brown & Co. against Henry Archibald, merchant, William Currie, merchant, Robert A. Campbell, broker, and Charles D. Edwards, manufacturer, for $1,051.27, amount of five promissory notes signed,

H. Archibald,
W. Currie,
R. A. Campbell,
} Trustees estate C. D. Edwards,

drawn to the order of, and endorsed by, C. D. Edwards, and by him endorsed to Brown & Co.

The declaration, after describing the notes, goes on to recite a deed of composition, of date the 18th of October, 1875, purporting to be executed under the Insolvent Act of 1875, between C. D. Edwards, as an insolvent, of the first part; various trading firms, banks and persons, his creditors, of the second part; the said Henry Archibald, William Currie, and Robert A. Campbell, of the third part; and Arthur M. Perkins, assignee to the estate of Edwards, of the fourth part.

This deed recites the fact of Edwards having become insolvent, Perkins having been appointed his assignee, and becoming vested with his estate, and Archibald, Campbell and Currie having been appointed inspectors to the estate.

It then goes on to declare, that Edwards had requested time from his creditors for the payment of their debts without interest, by instalments extending over thirty-six months, from 1st October, 1875; to which the creditors had acceded, and had agreed to authorize an assignment of the estate to Archibald, Currie and Campbell, to be held by them in trust for the creditors until Edwards should pay what he owed them.

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The creditors agreed to the extension desired, and expressly authorized the assignee to transfer the whole of the estate to Archibald, Currie and Campbell, who were to have the supervision and control of the business to be carried on by Edwards; having access to the business books of account, correspondence and vouchers, which control should specially include the purchase of goods, the incurring of debts and liabilities, and the like.

The assignee, Perkins, accordingly assigned to Archibald, Currie and Campbell, who accepted to hold for the creditors until the fulfilment of the deed, and to re-assign after its fulfilment.

That while the assets were in their possession, they, acting through Edwards, who carried on business under their supervision, purchased various quantities of coal and fuel from Brown & Co., for which he offered his own promissory notes, which Brown & Co. refused, requiring the promissory notes of Archibald, Currie and Campbell, which, on request, they gave in recognition of their liability for the purchase. They had failed to pay the notes, and negligently and illegally having divested themselves of the estate and delivered it up to Perkins, without providing for them, were liable to Brown & Co. for the amount thereof.

Archibald and Currie, by their plea, admitted that they had become vested with the estate under the deed of composition, and had supervised Edwards' business, but in February, 1877, Edwards being unable to meet his payments, Perkins, the assignee, had resumed possession of the estate, with everything thereto pertaining in the hands of the said Archibald, Currie and Campbell.

That they merely acted as trustees and agents for the creditors without profit or personal interest; that when the purchase was made Edwards explained the position of the parties under the composition deed to Brown & Co., who afterwards requested Edwards to obtain from Archibald, Currie and Campbell their promissory notes in their quality of inspectors and trustees, well knowing that they were not personally indebted, whereupon they made the notes in question, and signed them as inspectors and trustees; that, being afterwards deprived of the possession of the estate by its resumption by Perkins, they had nothing in their hands to pay the notes. Campbell pleaded to the same effect, with the addition that he was not even a creditor of Edwards. That he had no personal interest in the matter, and acted in the matter at the request of the creditors merely because he was an employee of the Exchange Bank, one of the creditors whom he represented at the meetings.

Brown & Co. replied, that the signatures of Archibald, Currie and Campbell were for the purpose of giving their personal responsibility; that they had refused to sell the coal on Edwards' responsibility; that Archibald, Currie and Campbell allowed Perkins, at their own risk, to repossess himself of the assets in their hands without returning the amount of the notes, and were responsible.

The main facts are admitted as follows: 1. The insolvency; 2. Perkins' appointment and possession; 3. The execution of the composition deed; 4. Edwards having afterwards carried on business under the supervision of Archibald, Currie and Campbell, until 6th February, 1877, when Perkins re-took possession of the estate, without Archibald, Currie and Campbell retaining in their hands funds to meet the notes in question, or any other of the liabilities of the insolvent.

Edwards is examined, and states that when he purchased the coals from Brown & Co. he explained to them the position of affairs, and at first gave his own notes for the purchases. Archibald, Currie and Campbell were aware of the purchases. He afterwards, at the request of Brown & Co., obtained and gave them the notes of Archibald and others in exchange for their own; it was explained to Brown & Co. at the time of the purchase, that it was a claim on Archibald and others as trustees.

Archibald is examined, and states that Mr. Brown as a favor asked him to give their notes as trustees, because he could not use Edwards' notes, or get them discounted; he and his colleagues as trustees did not disapprove of the purchase.

On this case the presiding judge of the Superior Court held Archibald, Currie and Campbell liable personally, and they have appealed to this Court against the judgment.

If the notes stood alone, without the accompanying deed of composition, there are ample precedents to hold the signers liable personally, unless they could show that they signed as agents for a principal who was bound by their signature.

I take it to be acknowledged law that a person cannot, merely by assuming to himself a representative character, escape from personal liability in respect of his contracts. Unless his contracts, in such representative character, bind some known third party, such words of addition to his signature will be considered mere matter of description, and the irresistible conclusion is that the party with whom he has contracted, must have looked to the personal security of the promissor for the due performance of the contract. Somebody must have been intended to be bound by the contract, and if there is no third party to resort to, the person contracting or promising as trustee, commissioner, &c., is the party to be charged.

See Addison on Contracts, p. 960. If persons make promissory notes, as executors, churchwardens, overseers, &c., they will be personally responsible on such notes. Childs vs. Morriss, 5 Moore, p. 282. Story, on Bills of Exchange, citing French, English and Scotch law, at § 75 says: But each law proceeds upon the same general principle; for if the principal is incapable of contracting in the particular case, or is not bound by the contract, then the agent contracting *en autre droit* is bound by each law.

Again, does a resort to the deed of composition deed change the powers, position or liabilities of Archibald et al? In that deed they are not even styled trustees, nor given any representative capacity; the contract is in their own names as individuals, and not otherwise. True, in a certain sense they were trustees, as they were vested with property for the benefit or behoof of others; and any one who holds property for which he is accountable to another, is in a certain sense a trustee, yet for the trust, he is personally responsible on his own personal contract, and is not thereby invested with an artificial or representative quality.

By the name of trustees they had no legal capacity, nor could such representative quality be recognized in them unless some law created the office, defining for it a representative capacity in which they had power to act, such as in the case of a tutor, executor, &c., or that by the contract they indicated that they acted as agent for some party competent to contract, from whom they in fact held a

Archibald et al. and Brown et al.

sufficient authority to entitle them to enter into the contract on his or their account. In this case they had no capacity of a representative character created or authorized by any law or statute. So far as this is concerned, the addition of the term trustees to their signatures was no more than an idle formality, save, perhaps, in their own interest, to enable them to distinguish in keeping separate accounts of the property they had undertaken to manage.

It is true, they are the same persons as were inspectors under Edwards' insolvency, but whatever quality or powers they had as inspectors under the insolvency law, terminated by the insolvency of Edwards being superseded, and his estate withdrawn from the Insolvency Court. The parties were thereupon left to be governed by the strength of their conventions as individuals.

But it may be said that the composition deed showed that these persons were really trustees, and that as such they should be considered agents acting for a principal. But if they are trustees or agents for any one they are so for the creditors, as is in fact expressly declared in the deed, and in no sense for the debtor. It would point at too remote a remedy to say that the intention in making the notes in question was to bind all the creditors; and as regards the debtor, there might possibly have been some room for inference that the debtor was the agent of Archibald et al., but none for them being considered the agents of the debtor, they were his masters, not his servants. As to their being agents for an estate, there was no such thing as an estate to be agent to. The particular property and assets that were transferred to them by the assignee of Edwards' estate in insolvency were no longer an estate, but only certain particular assets which they had agreed to take hold of and administer for the creditors. If they chose to purchase more goods for the same fund, it was they who purchased and they who became liable on their contract. They did not and could not say, we purchase for a particular individuality, represented by certain assets in our hands. It is that property, and not we who buy from you, and that we make responsible in signing as trustees. We bind that property, but we do not bind ourselves. I deny that in a commercial convention, an independent fiduciary estate can be created to be administered by agents binding that estate by purchases of goods, or signing promissory notes without rendering themselves personally responsible.

The deed in question was so framed, that Archibald and others, were to hold all the property, while the late insolvent Edwards was to carry on business, and of course incur liabilities, but without any of the means in hand to liquidate them. He was subject to the supervision and control of Archibald et al., even in regard to purchases which he could not make if forbidden by them. It was natural, under such circumstances, that a new creditor furnishing goods for the business should seek the liability of the masters who held the property, rather than that of the servant who held none of it. Although Brown & Co. may at first have been willing to take the notes of Edwards, yet when they carried them to their bankers, who probably understood the affair better than they did, on their bankers objecting to them they asked and obtained the signatures of Archibald et al.; to what end? The bankers no doubt wished to hold Archibald et al. on the notes, and if they could, Brown & Co. could do so also. Archibald says they were so signed as a favor to Mr. Brown; no doubt a substantial favor, not an unmeaning form. Still, it is

said that the value was furnished to Edwards; that his estate is liable for it; that it has gone back into the hands of Perkins, the assignee; that, under sec. 59 of the Insolvent Act of 1875, the assignee had power to resume, and did actually resume, the estate, and that Brown & Co. may prove against it. Admitting that they might do so, it is not the remedy they contracted for. But what estate had the assignee a right to resume? Not any individual aggregate of assets in the hands of Archibald et al., but the property of Edwards wherever it might be found, and as such, the property that was put into the hands of Archibald et al., but of course subject to their *droit de rétention* or lien upon it for the liabilities they had incurred on account of it. If from indifference or voluntary action they have surrendered their security, it is no reason why they should be relieved from their undertaking.

The test of liability in my judgment depends on the principles applicable in cases of principal and agent, this being one of such cases.

The appellants have cited two precedents, no doubt the most nearly favorable to their views that could be found. One is that of Redpath vs. Wigg, L. R. 1 Exch. 335, 340 and 341. It was a claim by a new creditor against the inspectors of an estate in insolvency under the arrangement clauses of the English Bankrupt Act; it differs from this case, in the important particular that the inspectors there, were existing legal functionaries, having powers of supervision and control of the insolvent's business under the Bankrupt Act, which allows the business to be carried on under supervision while the estate is still in bankruptcy under the control of the Court; while in the present case the legal insolvency had terminated, and the parties had come to be governed by their conventions. But that case was determined strictly on the principles of law applicable to principal and agent. The insolvent there was vested with the property of his own estate, the order given by the inspectors for the goods was in the name of the insolvent, signed on his behalf by the inspectors expressly as his agents, and there was no evidence to show that they had acted as the masters of the insolvent. He was treated as in fact he was principal, and the inspectors as agents, the quality in which they professedly acted. In Eastbrooke vs. Parkyn it appeared that the credit had been given directly to the insolvent, without the trustees having had any knowledge of the transaction, or sanctioning it in any way. In neither case did the plaintiff recover, but it is evident from the reports that, had the inspectors in the one case, and the trustees in the other, been made out to have been principals, they would in each case have been held personally liable.

The last case has a strong resemblance to the present, in that it was an assignment of a bankrupt estate to trustees, and that the business was to be carried on by the bankrupt under their inspection, but it was declared that the deed should operate as an inspectorship under the Bankruptcy Act of 1861, which gave the inspectorship a continued legal existence and authority.

RAMSAY, J.—I presume there can be no question that a party may limit his liability on a note in the same way he may limit his liability in making a contract for a web of cloth. But that is not the question before us. What we have to decide is whether, by writing the words "trustees estate C. D. Edwards"

Archibald et al. and Brown et al.

after a signature to a promissory note, the party signing is relieved of all personal responsibility on the note. Primarily the rule is that the person signing a note is bound to pay it. If he seeks to avoid this responsibility he should show some quality in which he signed. The way to test such a pretension in this case is to ask, who was bound on the note if the appellants were not? We have been told that it was the estate, and that if the estate went back into the hands of the assignee, that then the holders of the note would rank on the estate with the old creditors. This is evidently no answer to the question, for it is not a recourse on the note at all, and any one taking such a note would evidently hold the obligation of no person known to the law. It has also been said that the appellants should not be held because they did not intend to bind themselves personally. It is very probable from what we know of the case that they did not intend to pay the debts of the insolvent Edwards; but with their intentions we have nothing to do. It is perfectly evident that, whatever they intended, the respondents were perfectly determined to deal with them and with nobody else, and that they insisted from the first on their unequivocal personal obligation. I think the judgment should be confirmed.

Judgment of S. C. confirmed, the Chief Justice and Mr. Justice Monk dissenting.

Kerr & Carter, for appellants.

Abbott & Co., for respondents.

(S. B.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 17TH DECEMBER, 1879.

Coram SIR A. A. DORION, C.J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 1.

JOSEPH LALONDE ET AL.,

(*Defendants in the Court below*),

APPELLANTS;

AND

JUSTINIEN BELANGER,

(*Plaintiff in the Court below*),

RESPONDENT.

HELD:—1. The two years' prescription under C. C. 2261, par. 2, is not applicable to a claim for the value of property wrongfully carried away against the person who has taken it.

2. All who participate in an offence or quasi-offence (*délit ou quasi délit*) are jointly and severally liable for the loss or injury resulting therefrom, and therefore persons who have wrongfully cut and carried away wood which did not belong to them are jointly and severally liable to the owner for the value thereof.

SIR A. A. DORION, C.J. L'intimé Bélanger par son action réclame des quatre appelants une somme de $4,000 pour bois qu'ils ont coupé et enlevé depuis le 1er janvier 1873 au 22 décembre 1875, sur une propriété qui lui appartient dans la paroisse de Ste. Anne du Bout de l'Isle. Les appelants Joseph Lalonde père, Luc Lalonde son fils, Luc Lalonde père, et Hilaire Caron, gendre de Joseph Lalonde, ont plaidé séparément. Joseph Lalonde a admis qu'il avait

pris pour $300 de bois sur la propriété de l'intimé et les trois autres chacun pour $10, et ils ont déclaré consentir à ce que jugement fut rendu contre eux pour ces différentes sommes dont ils se reconnaissent redevables.

L'intimé n'a pas accepté ces admissions, et les parties ont procédé à l'enquête.

La Cour Inférieure, dans un jugement longuement motivé, a condamné Hilaire Caron à payer à l'intimé $20, avec intérêt et les frais d'une action de cette classe; Luc Lalonde père à payer $100, avec intérêt et dépens comme action de cette classe; et les deux autres appelants, c'est-à-dire Joseph Lalonde et Luc Lalonde son fils, à payer la somme de $20, avec intérêt et dépens, conjointement, et solidairement avec Hilaire Caron, celle de $100 avec intérêt, et dépens conjointement et solidairement avec Luc Lalonde, et de plus $480 aussi conjointement et solidairement, pour le bois qu'ils ont eux-mêmes pris sur la terre de l'intimé pendant la période couverte depuis le 1er janvier 1873 au 22 décembre 1875, y compris le bois qu'ils ont vendu à d'autres qu'à Luc Lalonde père et Hilaire Caron.

Les appelants prétendent que tous les dommages causés du 1er janvier 1873, au 22 décembre 1873 doivent être retranchés, parceque quant à ces dommages l'action est prescrite en vertu du § 2 de l'art. 2261 Code Civil, qui soumet l'action résultant de délits et de quasi délits, à la prescription de deux ans. A cela il y a deux réponses. La première c'est que les défendeurs n'ont pas plaidé la prescription, mais qu'ils ont virtuellement confessé jugement en admettant qu'ils étaient responsables chacun pour des sommes différentes. La seconde, c'est que la prescription de deux ans ne s'applique pas à une cause comme celle-ci, où l'intimé ne réclame pas tant la réparation d'un délit ou quasi délit, que l'indemnité qui lui est dûe pour l'enlèvement de sa propriété, dont les appelants ont profité. Cela a été jugé dans la cause de Bulmer et Dufresne et al., le 22 mars 1878, et confirmé par la Cour Suprême en juin 1879.

Les appelants prétendent encore que Joseph Lalonde était en possession de la terre en question, et qu'il en a fait les fruits siens jusqu'à l'époque où l'intimé a porté une action pour l'en déposséder, et sur laquelle il en a obtenu la possession.

Les appelants n'ont ni plaidé ni prouvé que Bélanger eut intenté une pareille action. Quelques témoins parlent bien d'une action entre Bélanger et Joseph Lalonde, mais rien ne fait voir quand elle a été portée, ni quelle en était la nature ou l'objet.

Les appelants prétendent encore que la preuve n'établit pas que les dommages excèdent les sommes pour lesquelles ils ont consenti à ce que jugement fut rendu contre eux.

Le juge de la Cour Inférieure est entré dans des calculs faits avec beaucoup de soin pour établir le montant des dommages, et nous ne pensons pas devoir changer le jugement. Il est vrai que dans un des considérants du jugement il est dit que la période couverte par la déclaration pendant laquelle les appelants ont pris du bois est de près de quatre ans, tandis qu'elle n'est réellement que de près de trois ans. Cela ne change pas les calculs d'après lesquels la Cour Inférieure a établi le montant des dommages qu'elle a fixé à $600.

Les appelants prétendent enfin qu'ils n'auraient pas dû être condamnés conjoin-

Lalonde et al. and Bélanger.

tement et solidairement. Cette objection ne peut être faite que dans l'intérêt de Joseph Lalonde père et de Luc Lalonde son fils, qui ont pris, coupé et vendu le bois de l'intimé lorsqu'ils savaient que ce bois ne leur appartenait pas, et ils ont été condamnés en vertu de cette règle, que tous ceux qui participent à un acte illicite, délit ou quasi délit, sont conjointement et solidairement responsables du tort qui en résulte. Sourdat, No. 473.

Le jugement doit être confirmé.

Judgment confirmed.

Duhamel, Pagnuelo & Rainville, for appellants.
DeBellefeuille & Turgeon, for respondent.
(J.K.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 17TH DECEMBER, 1879.

Coram SIR A. A. DORION, C.J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 196.

JOSHUA LEGGE, *Ès.*,

(*Plaintiff par reprise d'instance,*)

APPELLANT;

AND

THE LAURENTIAN RAILWAY COMPANY,

(*Defendants in the Court below*),

RESPONDENTS.

HELD:—1. That the engagement by a railway company of a civil engineer, for carrying out the construction of the railway, is a commercial matter, and may therefore be proved by verbal testimony; and any modification of the original agreement may be proved in the same way.

2. That, where a salary is payable in bonds to be taken at 50 per cent. of their nominal value, a tender of three bonds, equal to $1500 par value, is not a legal tender of the sum of $619.50, or $1239 in debentures, if the party tendering attaches the condition that the difference of $261 shall be returned to him in money.

SIR A. A. DORION, C. J. This action was instituted by Charles Legge, now represented by the appellant, his curator.

The declaration sets forth that on or about the 10th of December, 1873, Mr. Legge was appointed chief engineer of the Company respondent; that he has performed work and labor, as such, for $1180, and received $325 on account, leaving a balance of $855, which he claims.

The respondents have admitted by their plea that, on the 7th of February, 1876, they owed the plaintiff $744.50, as per his account which they produce; that they have paid $125 since, leaving a balance of $619.50 still due; that on the 12th January, 1875, the Board of Directors of the Company respondent passed a resolution fixing Mr. Legge's salary at $3000 per annum, payable in bonds of the company at 50 cents in the dollar, which resolution was passed pursuant to an agreement previously entered into between him and P. S. Murphy, the managing-director of the Company. This plea is accompanied by

a tender of three debentures of the Company of $500 each, equal to $1500, with conclusions that plaintiff be authorised to take these debentures on returning to the respondents $261, the difference between $1239 amount due, and the $1500 tendered.

The agreement pleaded has been denied, and at enquête objection was taken to the evidence of Mr. Murphy to prove this agreement. The objection was reserved, and finally the action was dismissed.

This action relates to the employment of a civil engineer by a railway company for carrying out its undertaking. The railway company is a commercial company and the railway itself is a commercial enterprise. The engagement of the plaintiff was, therefore, according to the current of decisions here, a commercial contract, which could be proved by verbal testimony. Not only could the original engagement be proved by verbal testimony, but any subsequent modifications, or qualifications, might also be proved by witnesses.

"Any obligation by writing, which is not under seal, may, in the absence of "statutory interference, be either totally or partially dissolved before breach, "by a subsequent oral agreement, etc.," 2 Taylor §1044, p. 996.

It was therefore competent for the Company respondent to prove the agreement by which Mr. Legge's salary was fixed at $3,000 per annum and was to be paid in debentures of the Company at 50 per cent. of their face value, and this was completely proved by Mr. Murphy.

The plaintiff was therefore only entitled to the sum of $619.50, or $1239 in debentures, as admitted by the respondents, for there is no sufficient proof of the error of $125 which the plaintiff contends was credited twice by mistake.

The Company however have not tendered $1239 in debentures but $1500, on condition that the plaintiff should return to them $261. The $261 might be of greater value than all the debentures tendered, and the plaintiff might be the loser by the operation. But, whatever may be the value of these debentures, the Company was bound to make an unconditional tender of the amount due. The amount in this case is $619.50 in money or $1239 in debentures, and it is a well-known rule of law that a tender, to be valid, must be of the exact sum or thing due. Art. 1163 C. C., Ancien Denisart, vo. offres No. 3. Merlin Rep. vo. offres No. 2. Dalloz, T. 10 No. 578, Favard de Langlade, vo. offres, p. 137.

The tender being irregular and insufficient the judgment of the Court below must be reversed, and the respondents are condemned to pay $1239 in debentures within fifteen days, with interest on $619.50 from date of service, and, in default of doing so, to pay $619.50 in money, with interest as above, and costs in both courts.

The judgment is as follows:

"La Cour, etc.,

"Considérant que la Compagnie intimée a reconnu devoir la somme de $619.50 à Charles Legge représenté en cette cause par l'appelant, pour les causes mentionnées en la déclaration en cette cause;

"Et considérant que l'intimée a prouvé que cette somme ne devait être payée qu'en bonds ou débentures de la Compagnie au taux de cinquante pour cent de leur valeur nominale, ce qui formerait un montant de $1239, que la Compagnie

Legge and Laurentian Railway Co.

intimée doit payer au demandeur en bonds ou débentures prises au cours du par ;

" Mais considérant que les offres et la consignation qué l'intimée a faite d'une somme de 1,500 en bonds ou débentures de la Compagnie sous la condition que l'appelant rembourserait à l'intimée la différence entre $1239 montant dû et celle de $1500, ne constituent pas des offres légales que l'appelant soit tenu d'accepter ;

" Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure le 31me jour de Mai 1878 ;

" Cette Cour casse et annule le dit jugement du 31 Mai 1878, et procédant à rendre le jugement qu'aurait du rendre la dite Cour Supérieure, condamne la Compagnie intimée à remettre au dit appelant ès qualité, sous quinze jours de la signification de ce jugement, des bonds ou débentures de la Compagnie intimée au montant de $1239 et, à défaut par la dite Compagnie de le faire, la Cour condamne la dite Compagnie à payer à l'appelant ès qualité la somme de $619.50 pour tenir lieu des dites débentures, et condamne en outre la dite Compagnie intimée à payer à l'appelant les intérêts sur la dite somme de $619.50 à compter du 20 Octobre 1877, date de l'assignation en cette cause, et les frais," etc.

Keller & McCorkill, for appellant.

De Bellefeuille & Turgeon, for respondent.

(J.K.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 17TH DECEMBER, 1879.

Coram SIR A. A. DORION, C. J., RAMSAY, TESSIER, CROSS, JJ., ROUTHIER, J., *ad hoc*.

No. 12.

ALFRED C. PINSONNEAULT ET AL.,

(*Defendants in Court below,*)

APPELLANTS ;

AND

ARTHUR DESJARDINS,

(*Plaintiff par réprise d'instance,*)

RESPONDENT.

HELD :—That the verbal testimony of one who was agent and afterwards testamentary executor of the debtor deceased cannot be received, after he has ceased to be executor, to prove an acknowledgment of a debt of the succession by him while executor, so as to take the debt out of the operation of the law respecting the limitation of actions. (1235 C. C.)

The appeal was from a judgment of the Superior Court, Montreal, JOHNSON, J.,) 30th December, 1878, maintaining an action brought against the legal representatives of the late Alfred Pinsonneault on an account for labor and materials. The judgment of the Superior Court was as follows :

" The Court, having heard the plaintiff *par reprise d'instance*, and defendants, by their attorneys as well upon the motion of said plaintiff *par reprise d'instance*,

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that objections made at enquête by defendants, and reserved by consent, be now rejected, as on the merits of the cause; having examined the proceedings, proof of record and evidence adduced, and duly deliberated, doth reject the said motion, and, adjudging on the merits;

"Considering that plaintiff has proved the essential allegations of his declaration, and particularly has proved by Honoré Cotté, a witness examined on his behalf, that, in 1873, the debtor (the late Alfred Pinsonneault) by himself and through his agent, the said Cotté, acknowledged the debt for which the action is brought, and promised to pay the same;

"Considering that the defendants are the heirs and legal representatives of the said late Alfred Pinsonnault;

"Considering that, on a public sale, held on the second day of September last, of the assets, *dettes actives*, accounts and rights of action belonging to and depending of the estate of said plaintiff, Joseph Brunet, who became insolvent since the institution of the present action, Louis Joseph Lajoie, assignee to the said estate, and thereto duly and legally authorized, sold to Arthur Desjardins, plaintiff *par reprise d'instance*, as the highest bidder therefor, the debt, *créance*, of the said Brunet against the said late Alfred Pinsonnault, and the right of action against the defendants in this cause, *ès noms et qualités*, for the recovery of the same;

"Considering the plea to be unfounded and unproved, doth dismiss said plea, and consider the tender made therewith insufficient;

"And the Court doth condemn the defendants ès noms et qualités jointly and severally to pay and satisfy to plaintiff *par reprise d'instance*, the sum of $276.47 currency, balance due upon a larger amount for the price and value of work and labor done and performed, and materials for the same furnished by said Joseph Brunet to and for the late Alfred Pinsonnault at his request, as per account Exhibit No. 1 filed by said plaintiff: with interest thereon from the 2nd day of January, 1877, day of service of process until paid, and costs of suit, *distraits*, &c."

SIR A. A. DORION, C. J. Cette action a été portée par Joseph Brunet pour une somme de $276.47, balance du prix et valeur d'ouvrages qu'il a fait pour feu Alfred Pinsonnault, représenté par les appelants. Il est allégué dans la déclaration que M. Pinsonnault et ses exécuteurs testamentaires ont reconnu cette dette.

Les appelants ont admis qu'ils devaient une somme de $3.20 qu'ils ont offert avec $8.55 de frais, faisant en tout $11.75, et ils ont plaidé que le restant du compte était prescrit.

Le demandeur, Brunet, ayant failli, l'intimé, cessionnaire de la créance réclamée, a repris l'instance.

Le compte a été prouvé, et M. Cotté, ci-devant agent de M. Pinsonnault et plus tard son exécuteur testamentaire, a été amené comme témoin pour prouver que M. Pinsonnault avait, de son vivant, reconnu la dette et promis la payer, et que lui-même pendant qu'il était exécuteur testamentaire avait également reconnu cette dette et promis la payer. Les appelants se sont objectés à cette preuve qui a néanmoins été admise, et ils ont été condamnés à payer la somme demandée.

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Ce jugement doit être infirmé et l'action renvoyée, excepté quant aux offres faites par les appelants.

La dette moins l'item admis par les appelants, était prescrite lorsque cette action a été portée,—et l'intimé ne pouvait en prouver la reconnaissance qu'au moyen d'un écrit. (Art. 1235 Code Civil § 2.)

L'intimé n'a produit aucun écrit émané de M. Pinsonnault, et le témoignage de M. Cotté ne peut suppléer à un tel écrit.

Mais l'intimé prétend que M. Cotté, ayant été l'exécuteur testamentaire de feu M. Pinsonnault, il doit au moins être reçu à prouver la reconnaissance qu'il a lui-même faite de la dette.

M. Cotté n'est plus exécuteur testamentaire. Il n'est pas partie dans la cause, il y a simplement été assigné comme témoin, et son témoignage ne vaut pas plus que celui d'un autre témoin digne de foi, même quant aux faits qui lui sont personnels.

Ce qu'il déclare quant aux admissions qu'il a pu faire lorsqu'il était exécuteur testamentaire, n'est après tout que la déclaration d'un témoin, et cette déclaration ne peut soustraire la dette réclamée aux dispositions du Code relativement à la prescription, lorsque l'article 1235 veut que cela ne puisse se faire qu'au moyen d'une reconnaissance par écrit.

Le jugement de la Cour Inférieure est infirmé et l'action de l'intimé renvoyée, excepté quant au montant admis par les offres des appelants, qui sont déclarées valables.

ROUTHIER, J. Tout le litige sur cet appel se réduit à une question de preuve.

Il s'agit de savoir si la prescription d'une dette excédant $50, peut être interrompue par la reconnaissance de l'agent du débiteur, et si l'aveu de cet agent, entendu comme témoin dans la cause après qu'il a cessé d'être agent, est un équivalent de la preuve écrite exigée par l'article 1235 du Code Civil.

En principe général, il est incontestable que l'aveu de l'agent lie son principal. Mais il faut que cet agent le soit encore au moment de l'aveu, et que cet aveu se rapporte à l'affaire que l'agent est chargé de conduire.

Cet aveu peut-il être prouvé par d'autres témoins que l'agent lui-même? Oui, dans les cas où la preuve testimoniale est permise. Mais s'il s'agit d'une cause où la preuve écrite est requise, il faut, pour suppléer à cette preuve écrite, l'aveu judiciaire de l'agent lui-même, et qu'il n'ait pas cessé d'être agent au moment de cet aveu. Car s'il n'est plus agent, c'est un témoin ordinaire, et l'admission même qu'il ferait d'une reconnaissance antérieure remontant à l'époque de l'agence, ne pourrait suppléer à la preuve écrite.

Cette doctrine est appuyée sur les meilleures autorités.

L'intimé a cité Greenleaf on Evidence pour établir que les admissions de l'agent lient son principal; mais après le passage cité, Greenleaf ajoute :

"The party's own admission *whenever* made may be given in evidence against him: but the admission or declaration of his agent binds him only when it is made during the continuance of the agency, in regard to a transaction then depending."

Taylor, No. 539, dit la même chose, et au No. 540, il ajoute : "Therefore *if writing is not necessary by law*, evidence must be admitted to prove that the agent did make the statement or representation.

Dickson on Evidence, No. 1471:

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"When a person is liable for the dealings of another, as his agent, he is also bound by whatever admissions or statements that person makes, in so far as they form part of the *res gestæ* of his transactions. But he is not bound by the agent's subsequent admissions of what took place; so that whenever a statement made by the agent verbally or in writing is a narrative *ex post facto* of the transaction in question, it will not be admitted as evidence against his principal. This distinction is on the just principle that the party bound himself to implement whatever obligations his agent actually contracted, but not for those which he merely admitted that he contracted; and the rule is necessary to prevent collusion between the agent and the party making the claim." 2 Starkie, p. 24; 1 Bonnier, No. 351, No. 357. Ces autorités sont plus que suffisantes pour démontrer que la preuve de reconnaissance faite par les demandeurs, consistant dans la seule déposition de H. Cotté, qui n'était plus agent du défendeur alors, est une preuve illégale qui aurait dû être rejetée par la Cour Supérieure.

Le jugement doit donc être renversé et l'action renvoyée pour toute la partie prescrite du compte des demandeurs.

The judgment of the Court is as follows:

"Considérant que le compte sur lequel est porté cette action était prescrit, lorsqu'elle a été portée, à l'exception du dernier item offert par les appelants avec leur défense;

"Et considérant que l'interruption de prescription invoquée par l'intimé ne peut être prouvée par témoins, et que le témoignage de Honoré Cotté pour prouver la reconnaissance qu'il a faite de la dette est d'après l'article 1235 du Code Civil, illégal et inadmissible;

"Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure à Montréal le 30 décembre 1878;

"Cette Cour casse et annule le dit jugement, et procédant à rendre le jugement qu'aurait du rendre la Cour Supérieure, déclare les offres faites par les dits appelants bonnes et valables, ordonne que les deniers ainsi offerts soient payés à l'intimé, et renvoie l'action de l'intimé quant au surplus, avec dépens, tant en Cour Inférieure que sur le présent appel."

Judgment reversed.

Lacoste & Globensky, for appellants.
Roy & Boutillier, for respondent.
(J. K.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 22ND MARCH, 1879.

Coram HON. SIR A. A. DORION, Ch. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 27.

Rolfe & The Corporation of the Township of Stoke.

HELD:—That an appeal lies from a judgment of the Circuit Court under Art. 100 of the Municipal Code.

RAMSAY, J. This is a motion on the part of the respondent to reject the

Rolfe & Corporation of Township of Stoke.

appeal, the case not being appealable. It is argued on the part of the respondent that, by Art. 100 of the Municipal Code, the jurisdiction to set aside a municipal roll is given jointly to the District Magistrates' Court and to the Circuit Court; that the proceedings are all under Chap. 7 Municipal Code, and therefore are summary; that the evidence may be taken orally or in writing, and that there is no express appeal given to the Circuit Court, while it is expressly taken away from the Magistrates' Court. All this, it is contended, shows that the Legislature did not intend to give an appeal, or to make the general rule of Art. 1142 C. C. P. apply to the class of cases of which this is one. That, on the contrary, by Art. 1033 C. C. P., the appeal to the Queen's Bench is limited in matters relating to municipal corporations and offices, and it is added that if 1142 C. C. P. is generally applicable, it does not touch this case, as it is for no sum of money, and binds no future right. This point is not a novel one for this Court. In the case of Cooey and the Corporation of the County of Brome, which was as to the validity of a by-law, we distinctly held that there was jurisdiction in this Court to hear the appeal, and we reversed the judgment of the Court below. The case of the Corporation of the County of Drummond and the Corporation of the Parish of St. Guillaume was cited to show that the jurisprudence of this Court on the point was not uniform. The citation is unfortunate, for in that case we allowed the appeal, but we sent the case back to the Court below on account of irregularities. It came back, and on the merits we confirmed the judgment. If any doubt should exist as to the correctness of the opinion which the Court expresses, there can be no question at all events of the uniformity of the jurisprudence of this Court, for there is still another case of McLaren and the Corporation of Buckingham (June, 1875), where we decided exactly as in this case. The motion of respondents is dismissed with costs.

Motion to dismiss appeal rejected.

Brooks & Co., for appellant.
Hall & Co., for respondents.
(S. B.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 20TH SEPTEMBER, 1879.

Coram SIR A. A. DORION, C. J., MONK, RAMSAY, TESSIER & CROSS, JJ.

Ex parte Corwin, petitioner for change of venue.

HELD:—That the Court of Queen's Bench, sitting in appeal, will not entertain an application for change of venue on behalf of a person charged with manslaughter in the District of Three Rivers, where no reason appears why the application should not have been made before the judge resident in the District of Three Rivers, where the offence would otherwise be triable.

RAMSAY, J. An application is made by the defendant, who is charged with manslaughter on the finding of the Coroner of the District of Three Rivers, for change of venue. The question we are going to decide is not on the merits; in fact, we have not examined the affidavits. We say that the application ought not to be made here. We are not prepared to say that we are not as competent

Ex parte Corwin.

as a single judge in chambers; still it has never been the practice to make such an application on this side of the Court. Again, we have no reason given us why the Court at Three Rivers should not take cognizance of the matter. We do not think, therefore, it would be a proper exercise of our discretion to entertain the application, and it is rejected; but we wish it to be understood that we are not deciding anything as to the merits.

The case of Mr. Brydges has been referred to, but that was entirely different. Mr. Brydges was arrested in Montreal, on a Sunday morning, on a charge of a constructive felony. An application was made before Mr. Justice Badgley in chambers to change the venue, and in the exercise of his discretion he granted the application. When the case came before me, the question was whether Mr. Justice Badgley had properly exercised his discretion, and I said I had no authority to decide that.

MONK, J. I have grave doubts whether we have jurisdiction, sitting as a Civil Court, to take up this matter. It is true that writs of error are submitted to us, and applications for *habeas corpus*, but that power is expressly given by Statute.

Petition rejected.

F. X. Archambault, for the Crown.
E. C. Monk, for defendant.
(J. K.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 16TH SEPTEMBER, 1879.

Coram SIR A. A. DORION, C. J., MONK, RAMSAY, TESSIER & CROSS, JJ.

No. 20.

THE CORPORATION OF THE TOWNSHIP OF GRANTHAM,

(*Defendants in the Court below,*)

APPELLANTS;

AND

GEORGE COUTURE ET AL.,

(*Plaintiffs in the Court below,*)

RESPONDENTS.

HELD:—That a Municipal Corporation will be condemned to pay the amount of a promissory note signed by the Mayor and Secretary-Treasurer in the name of the Corporation, where it is neither alleged nor proved that the note was given without lawful consideration.

The appeal was from a judgment *ex parte* of the Superior Court, District of Richelieu, condemning the appellants to pay the amount of the following promissory note:—

The Corporation of the Township of Grantham and Couture et al.

" $872.02 " Sorel, 12 Juillet 1877.

" Trois mois de cette date pour valeur reçue, la Corporation Municipale du Township de Grantham promet payer à l'ordre de L. A. Sénécal, au bureau de la Banque des Marchands, ici, la somme de huit cent soixante et douze piastres et deux centins courant.

(Signé)

" P. N. DORION,

" MAIRE,

" J. T. CAYA,

" SECRÉTAIRE-TRÉSORIER."

The appellants submitted:—

1o. Une corporation municipale n'a pas le droit de transiger sur des billets promissoires.

2o. Si toutefois le billet promissoire d'une corporation municipale pouvait être considéré comme un acte valable, ce ne peut être dans tous les cas que comme reconnaissance d'une dette, et la poursuite qui serait instituée sur tel billet devrait être appuyée de la preuve que ce billet était la reconnaissance d'une dette et que la corporation devait cette dette.

3o. Le Maire et le Secrétaire-Trésorier d'une corporation municipale n'ont aucun droit quelconque d'engager cette corporation et de consentir un billet pour elle sans y être autorisés par résolution du conseil comme dans les cas ordinaires; et encore ce ne peut être que dans les conditions mentionnées, à la deuxième raison ci-dessus.

4o. Dans la présente cause, le billet sur lequel est bâsée l'action, n'a jamais été autorisé par l'appelante. Le Maire et le Secrétaire-Trésorier, d'après les pièces du dossier auraient consenti ce billet au nom de l'appelante, de leur chef et sans autorisation; telle autorisation du moins n'est pas prouvée. Il n'y a aucune preuve au dossier que ce billet aurait été donné en reconnaissance d'une dette due par la corporation.

L'appelante soumet humblement que le jugement dont est appel est erroné; qu'il ne peut être maintenu par cette Cour.

Affirmer le principe contraire aux prétentions de l'appelante serait attribuer aux corporations municipales une autorité que ne leur donne pas le Code Municipal; et aux officiers des corporations municipales des pouvoirs qui mettraient tous les biens des contribuables entre les mains d'officiers sans responsabilité, qui ne donnent aucune garantie pour la due exécution des fonctions de leur charge.

SIR A. A. DORION, C. J. Les intimés ont poursuivi la corporation appelante pour $876.23, montant d'un billet signé par le Maire et le Secrétaire-Trésorier au nom de la Corporation en faveur de L. A. Sénécal, et endossé par ce dernier aux intimés.

L'appelante n'a pas plaidé et elle a été condamnée.

Elle appelle du jugement et elle prétend que la Corporation n'avait pas le droit de s'engager par billet, et que le Maire et le Secrétaire-Trésorier n'ont pas été autorisées à signer le billet dont les intimés poursuivent le recouvrement.

L'appelante qui a comparu par un avocat en Cour Inférieure aurait dû y plaider les faits qu'elle allègue en appel, si elle voulait s'en prévaloir. Au reste,

il aurait fallu alléguer que le billet avait été donné sans cause, car un billet comporte la reconnaissance d'une dette pour laquelle une Corporation ou une Municipalité peut être poursuivie comme tout individu peut l'être. Corporation of Township of Grantham and Couture et al.

Cela ne fait aucune difficulté, et la Corporation appelante n'ayant rien opposé à la demande pour faire voir que ce billet n'avait pas une cause légitime, elle a été justement condamné à le payer, et le jugement de la Cour Inférieure est confirmé.

Judgment confirmed.

A. Germain, for appellant.
M. Mathieu, for respondent.
(J. K.)

COURT OF REVIEW, 1879.

MONTREAL, 29TH DECEMBER, 1879.

Coram SICOTTE, J., TORRANCE, J., RAINVILLE, J.

No. 1928.

Heritable Securities and Mortgage Investment Association (Limited) vs. *Alfred Racine.*

HELD:—That a judicial sequestrator may be appointed by a Judge in Chambers.

SICOTTE, J.—La nomination d'un séquestre par un juge, *en chambre*, est contestée, pour deux raisons: 1o. La nomination doit se faire à l'audience, et non en chambre; 2o. Il n'y avait pas cause pour faire telle nomination.

Quant au premier moyen, il suffit de lire l'art. 876 du Code de Procédure, pour constater que le pouvoir du juge n'a été exercé, tel que permis par la loi; "toute demande en séquestre est formée par requête présentée à l'audience, ou à un juge," cette opposition entre les deux mots; "à l'audience ou à un juge," ne peut laisser de doute, que le juge a, dans ces cas, juridiction, soit *en terme*, soit *hors terme*.

Il y a de nombreux précédents analogues à celui de la présente cause, tant pour le mode de nomination, que pour les causes de nomination de séquestres.

Dans la cause, Dambourgès *vs.* Morison, une requête pour faire nommer un séquestre, fut présentée en chambre, à M. le juge Torrance. Cette requête fut rejetée; non parceque le juge n'avait pas pouvoir pour l'accorder, mais parceque la contestation dans la cause, était sur la validité d'un testament, et non touchant les biens. Cette décision fut soumise au tribunal d'appel, qui débouta l'appel, parceque la loi n'accordait pas d'appel dans telles matières, requérant célérité.

Quant aux causes de nomination de séquestres, elles sont énoncées dans l'art. 1823, C. C.: "Le séquestre peut être ordonné d'une chose mobilière ou immobilière, dont la propriété et la possession est en litige.

Dans l'instance des Dames Dambourgès *vs.* Morison, le factum des appelantes, représentées par M. Piché, contient des citations d'autorités et de nombreux précédents parfaitement applicables à la présente cause. Je n'en citerai que quelques parties: "Il suffit pour autoriser le séquestre, que l'insolvabilité ou la

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mauvaise conduite de celui qui possède, laisse des doutes sur la bonne administration, et sur le sort des fruits, pendant le litige."

Jousse, Com. Ord. de 1667 " La demande en séquestre se forme aussi, pour empêcher que la partie adverse ne dissipe les fruits, ou n'abuse de la chose contentieuse, pendant le cours du procès." Cour Royale de Bourges: " Considérant qu'en principe, les tribunaux ont le droit d'ordonner une mesure conservatoire, lorsque l'intérêt des parties l'exige: qu'à l'égard du séquestre l'ordonnance de 1667, leur laissait une latitude illimitée; que comme on le disait à la Cour de Cassation, le pouvoir accordé aux juges d'ordonner le séquestre provisoire des objets litigieux, est indéfini, et confié à la discrétion et à la sagesse des tribunaux, etc. : que si enfin quelque circonstance fait sentir le *besoin de conserver le gage*, alors le principe d'équité, le premier de tous, celui pour qui tous les autres ont été faits, exige que la justice prenne les mesures les plus efficaces afin que les intérêts de chaque partie soient ménagés, et que celle qui en définitive sera jugée avoir droit à la chose, *la retrouve dans son entier*.

Dans l'espèce, les demandeurs, ont, d'après les titres, droit de percevoir les revenus dans l'éventualité déterminée par la convention; le séquestre n'est alors qu'un moyen d'assurer l'exécution du contrat, et d'empêcher la dissipation des revenus au détriment du créancier qui a prêté les deniers pour faire les constructions qui donnent ces revenus.

D'après la lettre et l'esprit de notre loi, et l'interprétation donnée par nos tribunaux, il faut dire et conclure, qu'il suffit pour autoriser le séquestre, que l'insolvabilité ou la conduite de celui qui possède, laisse des doutes sur le sort des fruits pendant le litige; à fin, comme le remarque Pigeau, d'obvier aux maux qu'entraine la lenteur de l'instruction et les chicanes des plaideurs.

Le jugement est confirmé.

John L. Morris, attorney for plaintiff.

E. U. Piché, Q. C., attorney for defendant.

(J. L. M.)

COURT OF QUEEN'S BENCH, 1878.

MONTREAL, 18th SEPTEMBER, 1878.

Coram DORION, Ch. J., MONK, J., RAMSAY, J., TESSIER, J., DUNKIN, J. *ad hoc*.

No. 137.

WILLIAM J. M. JONES,

(*Defendant in the Court below*),

APPELLANT,

AND

MONTREAL COTTON COMPANY,

(*Plaintiffs in the Court below*),

RESPONDENTS.

HELD:—That a subscriber to the stock-list of a company in course of organization, and subsequently organized, is bound strictly by the conditions of the subscription list, and that the company subsequently incorporated is not bound by the stipulations in a private letter granted to the subscriber by a promoter of the company, who obtained the subscription and who signed this letter as secretary *pro tem.* and director of the company.

By the judgment of the Superior Court (DORION, J.) appellant was con-

demned in $750, interest and costs, as the alleged holder of 25 shares of the capital stock of the Company respondents, and indebted to the Company in that amount for calls on these shares.

Appellant denied all liability as alleged, and pleaded:

1st. That in December, 1873, Hobbs, acting as secretary *pro tem.* and director of the "Montreal Cotton Company," applied to him for a subscription to the stock of this Company, a two-fold incorporation, viz., an hydraulic and a cotton company; that he was willing to subscribe to the hydraulic enterprise alone, and did subscribe, on condition that the two objects of the Company should be separated, and on similar terms to what was stipulated by Messrs. Brydges, Cramp and Thomas, who had subscribed to the stock list of the Company, with the following conditions set opposite to their signatures, namely: "C. J. Brydges, Thomas Cramp, F. W. Thomas and associates, conditionally that the Hydraulic & Cotton Companies are separated and the arrangements approved." That the conditions under which appellant subscribed for his shares are stated in a letter, granted by Hobbs to him at the time, as follows:

"W. J. M. Jones, Esq.

Dear Sir:

Your subscription to the Montreal Cotton Co. is on the same terms as Messrs. C. J. Brydges, Cramp and Thomas, conditionally that the Hydraulic and Cotton Cos. are separated, and the arrangements approved.

Yours truly,

(Signed) WILLIAM HOBBS,
Secretary *pro tem.* and Director Montreal Cotton Co.

That these conditions as to the separation of the Company into two parts had not been fulfilled; that Messrs. Brydges, Cramp and Thomas, had been allowed to cancel their subscription, and that appellant was also entitled to be freed from all liability.

And, 2nd, that the respondents did not comply with the requirements of the law in the organization of the Company, and had thereby forfeited their corporate rights; and that Messrs. Brydges, Cramp and Thomas had been afterwards illegally relieved of their subscriptions.

To the first plea it was answered by the respondents, that the appellant's subscription was unconditional, save as to the conditions which formed the heading of the agreement to which his signature was subscribed, and which included an authorization to apply for letters patent; that, if such a letter as that referred to ever had existence, it was wholly unauthorized, and did not bind the Company; that appellant took part in a meeting of shareholders of the Company in August, 1873; that letters patent were issued in January, 1874, and that, in the February following, the question of separating the undertaking into a hydraulic and a manufacturing company was discussed at several meetings, and it was decided that the division was not practicable; that appellant acquiesced in this decision, and paid several calls, both before and thereafter, and frequently acknowledged his liability. And to the second plea:

That Messrs. Brydges, Cramp and Thomas had never been relieved of their

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subscription, and that the appellant was not justified in attacking the legality of the respondent's charter, other than by proceedings to have the same revoked.

By permission of the Court the appellant fyled a special replication: that any act of his at the meetings of shareholders was anterior to the incorporation of the Company, and prior to any determination not to conform to the conditions of the subscription, and, consequently, was no waiver thereof.

It appears that appellant's subscription was on or about 1st May, 1873.

That, on 5th August following, appellant seconded two resolutions at a meeting of shareholders of the Company.

That letters patent incorporating the Company, respondents, were issued 13th January, 1874.

That on the 6th June, 1874, it was resolved, at a meeting of the shareholders, to proceed with the building of a cotton mill on certain hydraulic lots granted by the Government at Valleyfield.

That appellant paid 20 per cent. on his stock, thus: 5 per cent. on 5th December, 1873; 5 per cent. on 26th August, 1874; 5 per cent. on 18th November, 1874; and 5 per cent. on 12th June, 1875.

That Hobbs granted to appellant the letter of the 5th December, 1873, on the occasion of his paying the first call on the stock subscribed by him on the 1st May previously.

That the heading of the stock list signed by the appellant stated that the subscribers were to form a joint stock company, with a capital of $500,000, divided into 5000 shares of $100 each, to acquire certain hydraulic lots and such other property as they might require to erect extensive cotton mills and other manufactories, and to carry on the same. That application should forthwith be made for letters patent incorporating the subscribers under the name of the "Montreal Cotton Company."

That appellant, with others, petitioners, is declared in the letters patent to be incorporated by the name of the "Montreal Cotton Company," for the acquisition of real estate and water powers, to be used for and in connection with manufactures of wool, cotton and other fabrics, the erection of necessary buildings and carrying on of such manufactures, the buying and selling of all kinds of material necessary for the above purposes and of the fabrics produced by such manufactures.

At the trial, the Court would not allow parol evidence to be adduced to contradict or qualify the conditions of the stock list, which appellant had signed, as being the written agreement between the parties, and gave judgment for the respondents.

The appellant sought the reversal of the said judgment of the Superior Court, or at least the remission of the record to the Superior Court, that evidence might be adduced to sustain the allegations of appellant's pleas.

The judgment of this Court, maintaining the judgment of the Superior Court, and dismissing the appeal, is as follows: "Considering that the letter signed, William Hobbs, secretary *pro tem.* and director Montreal Cotton Company, dated 5th December, 1873, and annexed to the defendant's plea, is not binding on the

plaintiffs, and that the defendant hath not proved the allegations of his pleas; doth adjudge, &c., &c. Judgment confirmed.

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Appellant's authorities:

Stephen's Digest of the Law of Evidence, p. 89, Nos. 3, 4.
2 Taylor, Evidence, p. 990, par. 1038 (Edn. 1872).
Stephen's Digest, p. 88.
Kerr, Fraud and Mistake, p. 389.
2 Taylor, Evidence, § 1042. (Edn. 1872).
Domat (by Strahan), vol. 1, p. 802, art. 2023.
" " " " " p. 806, art. 2032.
Pothier, Obligations, No. 800.
Brice, Ultra Vires (Edn. 1874), p. 416.
" " " " " p. 239.

Respondent's authorities:

Brice, Ultra Vires, p. 240.

Davidson & Cushing, for appellant.
Lunn & Davidson, for respondents.
(J.L.M.)

COURT OF QUEEN'S BENCH, 1878.

MONTREAL, 18TH SEPTEMBER, 1878.

Coram HON. SIR A. A. DORION, Ch. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 108.

ARTHUR B. COOLEY, ES QUAL.,

(Plaintiff in the Court below,)

APPELLANT;

AND

THE DOMINION BUILDING SOCIETY,

(Defendant in the Court below,)

RESPONDENT.

HELD:—1. That a note granted by a Building Society as collateral security for the repayment of a deposit made with it is not a negotiable instrument.

2. That such instrument does not fall within the terms of articles 2316 C. C. as to security to parties liable, as in a lost bill of exchange or promissory note.

This was an action instituted by the plaintiff in his capacity of executor to the last will of the late John Buxton, for the recovery of $1,000 loaned by said John Buxton to the respondent, with interest at 8 per cent.

The plea admits the plaintiff's case, but says that the plaintiff ought not to recover under this action, because, at the time the money was loaned, the Dominion Building Society gave the late John Buxton a promissory note, made by the defendant, through its officers, to the order of one F. A. Quinn, and endorsed by the latter, and some others, payable at even date with the loan. That

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this note was negotiable, and that the defendants had reason to fear future trouble from third persons who might be holders thereof.

The plaintiff, who was executor of the person to whom the note was alleged to have been given, denying all knowledge of the existence of such a note, and denying its existence, answered that he had made diligent search among the papers of the estate to find the same, and could not do so, but offered, in order to arrive at an amicable settlement, to transfer in trust to Edward K. Greene, a wealthy and well-known citizen of Montreal, fifteen shares of the stock of the Merchants Bank, of the par value of $1,500, until such time as such note should be discovered and returned, or prescribed. The plaintiff denied at the same time the right of the defendant as a Building Society incorporated for special purposes, to make negotiable paper.

Thereupon judgment was rendered in the Superior Court (JOHNSON, J.), 28th February, 1877.

"The Court having heard the parties by their respective counsel on the "merits of this cause, examined the proceedings, proof of record and evidence, "and deliberated; considering that the defendants have proved the allegations of "their plea, and that the sum of $1,000 and interest at eight *per centum* "thereon, due to the plaintiff *es qualité* in repayment of the loan and deposits "by the late John Buxton to and with the defendants, was, before the institution "of this action, tendered to the authorized agent of the said plaintiff, and that "the same has been repeated in the present cause; doth grant *acte* to the said "defendants of the said tender, and doth adjudge the same to have been and "to be good and sufficient, and doth further adjudge that the said plaintiff has "no right to maintain the present action for any greater sum or amount than "that tendered as aforesaid, and doth condemn the said defendants to pay "and satisfy to the plaintiff the said sum of $1,000 so tendered, and upon "the express terms and conditions of the said tender, that is to say, upon the "said plaintiff *es qualité* furnishing and giving to the said defendants, within "three months from this date, good and sufficient security according to law "against their being required to pay any sum of money and interest that may be "due under their promissory note of the 3rd July, 1875, but which cannot, as "it appears, be found, but which is proved to have been made by them on the "day last aforesaid, and signed by the president and secretary of the Dominion "Building Society, to wit, the defendants, and payable to the order of F. A. "Quinn, and by him and others endorsed and delivered to the late John Buxton; "and also upon the delivery to them by the said plaintiff of the deposit book "and a cheque, signed by plaintiff *es qualité*, or other lawful representative of "the late John Buxton for the amount to be paid to them by the defendants; "and doth condemn the plaintiff *es qualité* to pay to the defendants their costs "of the present action."

Although the promissory note was not produced the secretary-treasurer of the defendants, a witness on their behalf, proved from the marginal slip of the defendants' promissory note book, that the note in question bore the number 45, was for $1,000, dated 3rd July, 1875, made in favor of the said John Buxton, payable at the office of defendants in Montreal, at the time when the said deposit

was made re-payable, and was given to the plaintiff on the day he made the said deposit, and as collateral security for the payment of the said deposit.

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This evidence was corroborated by other witnesses.

The judgment of the Court, holding this instrument not to have been a promissory note and negotiable as such, and reversing the judgment of the Superior Court, is as follows:

"Considering that the appellant has proved the material allegations of his "declaration, and namely, that John Buxton, whom he represents, did on the "3rd July, 1875, deposit with the respondents a sum of $1,000, payable at "the expiration of one year, with interest at 8 per cent;

"And considering that the note, which the respondents allege in their plea to "have then and there delivered to the said John Buxton, as collateral security "for the said deposit, is not a negotiable instrument; and that, although said "note is not represented by the appellant, the respondents are not exposed, after "re-payment of said deposit, to be troubled for the payment of the said note, "and are not entitled to claim security from the appellant, they not being within "the terms of article 2316 of the Civil Code;

"And considering that there is error in the judgment rendered by the Superior Court, at Montreal, on the 28th day of February 1877;

"And proceeding to render the judgment which the said Superior Court "should have rendered, doth condemn the respondents to pay to the appellant "the sum of $1,000, with interest thereon at 8 per cent., from the 3rd day of "April, 1876, upon the appellant tendering to the respondent the deposit book "received by the said John Buxton, and giving such cheque or receipt according "to the form ordinarily required by the Company from depositors; and this "Court doth further condemn the respondents to the costs incurred, as well "in the Court below as on the present Appeal."

Judgment reversed.

Archibald & McCormick, for appellant.

Abbott, Tait, Wotherspoon & Abbott, for respondents.

(J. L. M.)

COURT OF REVIEW, 1879.

MONTREAL, 30TH SEPTEMBER, 1879.

Coram TORRANCE, J., RAINVILLE, J., JETTE, J.

No. 472.

The Corporation of the Township of Acton vs. *Felton et al.*

HELD:—1. That school taxes cannot be sued for or recovered in the Superior Court.

2. That in a suit for arrears of municipal taxes, it is not necessary to produce the original collection rolls, and that proof of the public notice required by art. 960 of the municipal code and of true abstracts from the collection rolls is sufficient.

3. That arrears of such taxes due by a deceased person are properly recoverable from his universal legatee.

This was an inscription in review of a judgment rendered in the Superior Court for the District of St. Francis (DOHERTY, J.) on the 11th of March, 1879, dismissing the plaintiffs' action.

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The principal questions raised by the pleadings and at argument were that the plaintiffs had no right to sue at all for the recovery of the school taxes, and that the Superior Court, at all events, had no jurisdiction in the premises, a suit for the recovery of such taxes being limited to the Circuit Court; also that the proof of the municipal taxes was imperfect, the original collection rolls not having been produced, and that the defendant, W. H. Felton, was not liable, under any circumstances, to pay these taxes.

At the trial, proof was made of the public notice required by art. 960 of the Municipal Code, and that the abstracts produced were true abstracts from these original rolls.

The following was the judgment of the Court of first instance:—

"The Court having heard the parties by their counsel respectively as well upon defendants', W. H. Felton's, *défense en droit* pleaded separately to this action, upon which *preuve avant faire droit* was ordered, as upon the merits of this action, answers in law having been previously disposed of, examined the proceedings and proof of record and objections to evidence at enquête reserved, and deliberated; seeing that this is an action for municipal and school taxes, and that defendants have pleaded with other pleas a *défense au fond en fait* respectively; considering that this action is sufficient in law as against said *défense en droit*, doth dismiss the same; and on the merits;

"Considering that this action is brought partly to recover school taxes, assuming a jurisdiction in this Court exclusively reserved to the Circuit Court, and which this Court cannot exercise; considering that the balance of the amount claimed by this action is for municipal taxes, which can be claimed by plaintiffs only upon production and proof of a valuation roll by them made under the provisions of the Municipal Code, establishing the value of the taxable property as the basis of the taxes and assessments to be levied thereon, the existence of which roll they have neither alleged or proved; Considering that by the said Code the plaintiffs are bound and required to make, or cause to be made by their secretary-treasurer, a general collection roll each year, based upon said valuation roll, of the several amounts to be levied upon each property indicated upon said valuation roll, and that no taxes such as claimed by this action are leviable, due or exigible until such collection roll is so made, and public and special notice thereof given as required by said Code, and that no such collection rolls have been legally proved to have been made, and that none such are produced or proved in this cause, although their existence and such notices thereof are expressly denied and put in issue by the pleadings of both defendants in this cause:

"Considering that the amount of municipal and school taxes sought to be recovered by this action must depend upon the value of the property in question shown upon such valuation and collection rolls, and that the same does not become due or exigible by action in any Court until such rolls are prepared and published, and special notice, accompanied by a statement of the sums due, served upon all persons liable for such taxes, of the performance of which conditions precedent plaintiffs have made no proof whatever;

"Considering that while the plaintiffs might direct their secretary-treasurer to collect the school taxes by them so sued for in the manner of collection pre-

cribed by the said Code, to wit, without suit at law, the said taxes when properly due belong to the school municipality, which cannot sue by or in the name of the plaintiff or any other attorney;

"Considering finally that, as against the pleas and defences in this cause, the plaintiffs have wholly failed to establish by legal allegations and sufficient proof their right to recover the amount claimed by this action or any part thereof. Doth maintain defendant's pleas so severally pleaded, and dismiss this action as against both defendants, with costs distraits to W. H. Felton, attorney of the defendants, reserving such rights as plaintiffs may have in the premises."

The following was the judgment in Review:—

"La Cour Supérieure siégeant présentement à Montréal comme Cour de Révision, ayant entendu les parties par leurs avocats respectivement sur le jugement rendu en cette cause le onze mars 1879, par la Cour Supérieure du district de St. François, examiné la dossier et la procédure, et délibéré;

"Adjugeant préalablement sur les plaidoyers en droit de la demanderesse au cinquième plaidoyer du défendeur Felton, dont il a été disposé par jugement interlocutoire du 26 septembre 1878, maintient le jugement final en ce qu'il renvoie la défense en droit du défendeur Felton à l'action de la demanderesse, et adjugeant sur les deux réponses en droit de la dite demanderesse au deuxième plaidoyer de la défenderesse Clara Lloyd, les renvoie avec dépens, et procédant à adjuger au mérite;

"Considérant que la corporation demanderesse a légalement établi et prouvé sa réclamation pour taxes municipales et taxes de chemin de fer s'élevant à la somme de $257.13, duement et régulièrement imposées sur les terrains décrits en la déclaration en cette cause;

"Considérant que pour ce qui a rapport aux taxes d'écoles, formant partie de la demande de la demanderesse jusqu'à concurrence de $60.72, cette Cour n'a aucune juridiction pour en connaître, telle juridiction étant attribuée par l'article 1053 du Code de procédure à la Cour de Circuit exclusivement;

"Considérant quant à la défenderesse dame Clara Lloyd, qu'elle est poursuivie en cette cause ès-qualité de légataire en usufruit des immeubles imposés comme susdit en faveur de la demanderesse, et ce en vertu du testament de feu William L. Felton, son mari décédé, mais que lors de l'institution de cette action la dite défenderesse n'était plus usufruitière des dits immeubles, ayant renoncé à son dit usufruit en faveur de l'autre défendeur, son fils, par acte du 9 mars 1878;

"Considérant néanmoins que cette renonciation n'apparait pas avoir été enrégistrée et rendue ainsi publique, et qu'elle n'a été portée à la connaissance de la demanderesse que par son enfilure avec la défense de la dite dame;

"Considérant quant au défendeur W. H. Felton qu'il est légalement tenu comme légataire en propriété des immeubles imposés en cette cause (tel qu'il a accepté) au paiement des dites taxes municipales et de chemins de fer dues sur les dits immeubles;

"Maintient les défenses de la défenderesse dame Clara Lloyd, et renvoie et déboute l'action de la demanderesse contre elle, mais avec dépens depuis et après l'enfilure des dites défenses et la production de l'acte de renonciation du 9 mars

Corporation of the Township of Acton vs. Felton et al.

1878, en Cour Inférieure et dépens de révision seulement, les dits dépens distraits à W. H. Felton, écuier, avocat de la défenderesse, et condamne la dite défenderesse aux dépens de la dite action accrus contre elle jusqu'au jour de la production de la dite pièce distraits à Messrs. Brooks, Camirand & Hurd, avocats de la demanderesse;

"Et quant au défendeur Felton, la Cour renvoie l'action contre lui en autant qu'elle s'applique aux taxes d'école, mais la maintient quant au reste, et en conséquence le condamne à payer à la demanderesse la dite somme de $257.13, avec intérêt sur icelle à compter du 1er avril 1878, jour de l'assignation jusqu'à paiement, et les dépens tant de la Cour de première instance, que de cette Cour distraits aux dits avocats de la demanderesse."

Judgment of S. C. reversed.

Brooks & Co., for plaintiffs.
W. H. Felton, for defendants.
(S. B.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 20TH DECEMBER, 1879.

Coram SIR A. A. DORION, C.J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

Regina vs. *Sir Francis Hincks.*

The Banking Act of 1871 required monthly statements of the affairs of Banks to be made to the Government, signed by the president or other officer, and the form of return prescribed certain headings under which the liabilities and assets should be classed. The defendant, a bank president, was indicted for making a wilfully false and deceptive return, the falsity of the return consisting in the improper classification of the assets and liabilities. First, large sums borrowed by the defendant's bank from other banks, and for which deposit receipts were given, were classed as "other deposits payable after notice or on a fixed day"; secondly, demand notes were classed as "bills and notes discounted and current"; and, thirdly, over-drafts were also classed as "notes and bills discounted and current."

HELD:—1. The question as to whether the items firstly and secondly mentioned had been improperly classified was a question of fact for the jury, and not one of law for the Court.

2. As to the item thirdly mentioned, as matter of law, an over-draft is not current, and the classification of over-drafts under the heading of "notes and bills discounted and current" was properly held by the presiding Judge to be illegal.

3. The instruction to the jury, that wilful intent to make a false return may be inferred by the jury from all the circumstances of the case proved to their satisfaction, was correct.

4. Where no application has been made for a new trial, and the question whether a new trial should be granted has not been reserved, the Court sitting in appeal and error will not make an order for a new trial, when the conviction is quashed.

The following case was reserved by MONK, J., at the September Term (1879) of the Court of Queen's Bench, Crown Side, at the trial of Sir Francis Hincks for making a wilfully false and deceptive bank statement.

"The defendant was indicted under the Statute 34 Vict., cap. 5, sec. 62, relating to Banks and Banking, and was tried before me, on the 16th, 17th, 18th and 20th October, 1879. The return in question was dated 6th February, 1879, and purported to show the liabilities and assets of the Consolidated Bank of Canada on the 31st day of January, 1879.

During the trial several objections in law were taken to the ruling of the

Court, and were noted by me. After verdict of conviction, a motion for a reserved case, on the objections taken at the trial, was presented to the Court on behalf of the defendant, and I was of opinion that the following points should be reserved for the consideration of this Honorable Court, and they are now submitted accordingly:

1. It was proved upon the trial that the Consolidated Bank had, between the 24th October, 1878, and the 31st January, 1879, inclusively, borrowed large sums of money from several Banks in Canada, amounting in all to an advance exceeding $1,000,000, for which loans in all cases, except for one from the Bank of Montreal of $200,000, made on the 31st January, 1879, deposit receipts were granted by the Consolidated Bank to the lending Banks, payable on demand, or on time.

On the 31st January, 1879, these sums stood as follows, viz:

To the Staducona Bank, balance of a loan of $75,000,

$25,000 (for which a deposit receipt on time had been granted).

To the Bank of Commerce, $97,540 (deposit receipt).

To the Bank of British North America, $400,000. (Deposits receipts. To secure payment of this loan collaterals to amount of $352,056 were delivered to the Bank of British North America. These receipts were on demand.)

To the Bank of Montreal, $471,436.11 (for which deposit receipts, payable on time, were granted, except for $200,000 advanced on the 31st January, 1879, for which a letter of acknowledgment was given but not produced. This loan was payable on the 26th April, 1879. No demand of payment had been made in respect of any of the deposit receipts.

I ruled and directed the Jury, as a matter of law, that the fact of the Consolidated Bank having in most instances granted deposit receipts payable on time, did not alter the character of the transactions, or make of these amounts deposits of sums which were in reality loans; and I further ruled and directed that these loans, notwithstanding these deposit receipts, were not legally or justly included, as they were, under the head No. 7 of the Bank's liabilities, "other deposits payable after notice or on a fixed day," but should have been represented under No. 8, "amounts due to other Banks in Canada," or under No. 11, "other liabilities not included under the foregoing heads," both the latter headings being left in blank in the said statement and return.

The question reserved and now submitted on the above facts and rulings is, whether these loans, inasmuch as deposit receipts had been granted by the Consolidated Bank, payable on time, for the larger part of this amount, were legally and properly included, as they were, in the Bank statement, under No. 7 of its liabilities, "other deposits payable after notice or on a fixed day," or whether they should not have been placed under No. 8, "due to other Banks in Canada," or under No. 11, "other liabilities not included under the foregoing heads," which last, as in the case of No. 8, was left in blank in said return?

2. It was proved at the trial, that demand notes, to the amount of $247,360, had been deposited in the Bank, and these amounts carried to the credit of their respective makers, on or about the dates of the said demand notes, previous to

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the 31st January, 1879, by the order of the General Manager: that no demand for payment had been made of the same, or any of them, previous to the said 31st January, 1879: that between the 20th and 24th February, 1879, the said demand notes were discounted by the General Manager and reported to the Board of Directors at the next meeting. These demand notes were drawn against, before the 31st January, 1879, but were not discounted till between the 20th and 24th February, 1879, and were included in the statement under the heading No. 13 of the bank's assets, as "bills and notes discounted and current," on the 31st January, 1879.

I ruled and directed the jury, as a matter of law, that these demand notes, not having been discounted and current on the 31st January, 1879, should have been, in order to comply with the law, placed under No. 18, viz: "other assets not included in the foregoing."

The question arising on this head is, whether these demand notes should or should not have been, as they were, placed and included under No. 13 of the Bank's assets as "bills and notes discounted and current" on the 31st January, 1879, and before the same were discounted, or whether, on the contrary, they should not have been represented under No. 18, viz: "other assets not included under the foregoing heads," which last item, as a matter of fact, was left in blank in the said statement and return?

3. It was further proved at the trial, that over-drafts to the amount of $517,372.92, and not represented by notes and bills discounted and current on the 31st January, 1879, were entered and included under No. 13 of the assets of the Bank, in said statement, as "notes and bills discounted and current." It was proved to be the practice in the Bank of Montreal to place under the heading of "notes and bills discounted and current" over-drafts when they were connected with discount business, but the amounts so placed were proved to be very small.

I ruled and directed the jury, as a matter of law, that this amount of over-drafts should have been included under No. 18, "other assets not included under the foregoing heads," which was left in blank in said statement and return, and not under No. 13, "bills and notes discounted and current," on the 31st January, 1879.

The question now submitted is, whether in law this amount of $517,372.92 of over-drafts should or should not have been included under No. 18 of the assets of the Bank, as "other assets and liabilities not included under the foregoing heads," or whether it was not a violation, a deceptive evasion of the law, to enter these over-drafts under No. 13 as "bills and notes discounted and current"?

4. It was proved that the return had been prepared by the accountant of the Bank, who on all occasions had been in the habit of preparing such returns in that Bank, and of classifying transactions under the headings adopted in the return in question, and there was no direct evidence of any intention wilfully to make a deceptive statement, but I directed the jury, as a matter of law, that they might infer a wilful intention from all the circumstances of the case proved to their satisfaction.

The question reserved and submitted under this head is, assuming that the items mentioned in the three preceding entries are not as a matter of law properly classified in the return, whether the point of law laid down at the trial, in regard to their inferring wilful intention from all the circumstances, was or was not correctly ruled?

Judges Chambers, Montreal, 4 November, 1879."

RAMSAY, J. The defendant was indicted under the Banking Act (34 Vic., cap. 5, and 36 Vic., cap. 43), for making a wilfully false and deceptive return, and convicted.

Section 13 of the 34 Vic. enacts that "monthly returns shall be made by the Bank to the Government in the following form, and shall be made up within the first ten days of each month, and shall exhibit the condition of the Bank on the last juridical day of the month preceding, and such monthly returns shall be signed by the President, or Vice President, or the Director (or, if the Bank be *en commandite*, the principal partner), then acting as President, and by the Manager, Cashier or other principal officer of the Bank, at its chief seat of business." Then follows a form of return which is amended by the 36 Vic. The form in this last Act prescribes 11 headings under which the liabilities should be classified, and 18 headings under which the assets should be classified. Section 62 of the 34 Vic. proceeds to enact that "the making of any wilfully false or deceptive statement in any account, statement, return, report or other document respecting the affairs of the Bank, shall, unless it amounts to a higher offence, be a misdemeanor, and any and every president, vice-president, director, principal partner *en commandite*, auditor, manager, cashier or other officer of the Bank, preparing, signing, approving or concurring in such statement, return, report or document, or using the same with intent to deceive or mislead any party, shall be held to have wilfully made such false statement, and shall further be responsible for all damages sustained by such party in consequence thereof."

It will be at once observed that the gist of the offence consists in making a wilfully false or deceptive return. It is not, however, less clear that no return can be wilfully false or deceptive within the meaning of the Act if it gives all the information required by the statutory form. I would go a step further and say that, if the officers of the Bank introduced a classification which, going beyond the statute, created distrust and panic likely to depreciate the value of the stock, they would be over-stepping the line of their duty, and it would not be difficult to suppose circumstances in which they might expose themselves to indictment for a false return, as being injurious to the standing of the Bank. In a word, the object of the law appears to me to be to oblige Banks not to give a statement to show their weakness, as has been said, but to give certain details of information as to their affairs. In the present case it is not pretended that there is any misstatement as to the aggregate assets or liabilities of the Bank. The charge is that the statement is false in this, that there is an improper classification of items. It must be apparent that such a charge must give rise to questions of extreme nicety, unless the statutory form be constructed with logical precision, to which, I fear, it has no claim. These difficulties at once presented themselves in the prosecution of this case, and induced the learned Judge who presided at the trial

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to reserve four questions for the consideration of this Court. It may not be out of place for me to say here that the reserved case is so ample and clear that it has rendered our duty comparatively easy, and that it offers no reasonable ground for the defendant to complain of hardship.

Three of these questions are directed to enquire whether certain entries were misclassed, or not, and the last to enquire whether wilful intent can be gathered from the circumstances of the case without direct testimony. The first of these questions refers to certain loans by other banks, which are represented in the return under item 8 as being "other deposits payable after notice, or on a fixed day." In the reserved case the learned Judge says:—"I ruled and directed the "jury, as a matter of law, that the fact of the Consolidated Bank having in most "instances granted deposit receipts payable on time, did not alter the character of "the transactions, or make of these amounts deposits of sums which were in reality "loans; and I further ruled and directed that these loans, notwithstanding "these deposit receipts, were not legally or justly included, as they were, under "the head No. 7 of the Bank's liabilities, 'other deposits payable after notice or "on a fixed day,' but should have been represented under No. 8, 'amounts "'due to other Banks in Canada,' or under No. 11, 'other liabilities not "'included under the foregoing heads,' both the latter headings being left in "blank in the said statement and return."

I fully concur with the learned Judge in this ruling, in so far that it decides that the nature of the receipt granted "did not alter the nature of the transactions." If the transaction was a loan, and not a deposit, assuming that these transactions are distinguishable, the mere name given to it is wholly immaterial. But I must dissent from the ruling, inasmuch as I think it is matter of fact, and not of law, under what heading these amounts should be placed. It was argued that the form is part of the Statute, and consequently that its interpretation becomes matter of law. This is an ingenious contention, but I am not aware that technical words, or words used with a special meaning, are more within the knowledge of the Court when used in a Statute than when used in a deed, and no authority has been produced to support such a distinction. If we were to treat the entry as a matter of law, I am inclined to think I should be induced to arrive at a different conclusion from that of the ruling, and to say that the entry was strictly correct, and that, within the meaning of the form, all loans to Banks are deposits. So Government loans are styled deposits, and through the eleven items of liabilities we don't find an allusion to any "loan" save deposits. It certainly could not have been placed under heading 8, using "due" in its legal signification.

To some extent the same objection existed as to the ruling set forth 2ndly in the reserved case, viz:—"I ruled and directed the jury, as a matter of law, "that these demand notes, not having been discounted and current on the 31st "January, 1879, should have been, in order to comply with the law, placed under "No. 18, viz: 'other assets not included in the foregoing.'" I think it should have been left to the Jury to decide whether these notes were discounted or not; and, from the statement of fact in the case, it appears to me that these notes were discounted when passed to the credit of the owners, and when the owners

had drawn the proceeds. One very good test is this—Who was the owner of the note, after the customer drew the proceeds? Was it the customer, or the Bank? If it was not discounted, it was clearly the property of the customer, and it is only on this supposition that the asset, which would then have been the personal indebtedness of the customer on an over-drawn account, could have appeared under heading 18, "other assets not included under the foregoing heads." There are many cases to be found of conflicting claims of the banker and his customer, but they all turn on bills remitted to the banker, and where there is some ambiguity as to the use to which the bill was to be applied, or the object for which it was placed in the banker's hands. I don't believe any case can be found in which it was ever doubted that the property of a bill sent in for discount and passed to the credit of the person paying it in, and the proceeds of which were drawn by him, did not pass to the banker. The taking of a banker's acceptance in exchange for another bill endorsed to the banker is equivalent to a discounting of the bill, and, though the banker's bill be dishonored, the property of the bill will be passed to the assignee (Walker, on Banking Law, page 140). In the case of *Hornblower & Proud*, 2 B. & Ald., page 327, Abbott, C.J., said —"I am of opinion that in this case the non-suit was right. The case on the facts admitted, appears to be that Gibbons & Co., on the 2nd of March, exchanged a bill on Esdaile & Co. for the three bills in question, and I think that the property in the latter actually passed to them *by this exchange of securities*." Bailey, Holroyd and Best, JJ., emphatically expressed the opinion that the property was absolutely exchanged by the exchange of securities. The case was one of considerable hardship, for Esdaile & Co. actually got the three bills of plaintiff which were paid, and they refused even to accept the bill Gibbons & Co. drew on them and had given in exchange.

On the third ruling I agree with the learned Judge. As matter of law an overdraft is not "current."

I also agree with him on the fourth ruling. I think the Jury may infer the unlawful intent "from all the circumstances of the case proved to their satisfaction," and that mis-classification is a fact from which such wilful intent may be inferred.

This is substantially the opinion of the whole Court.

In conclusion, his Honor said it now came to be a question what should be done— what order could the Court give in the matter? The statutory changes in the law since Confederation had led to a good deal of embarrassment, and it was difficult to say what should be done. In the case of Bain the Court quashed the verdict and ordered a new trial. But in this case there was no application for a new trial. There was no reserved question for a new trial, and the Court was not sure that, under the circumstances, it could give an order that a new trial should take place. Therefore, the judgment would simply go to quash the verdict, leaving the parties to any remedy they may think proper to adopt.

MONK, J., said, out of deference to his colleagues he would not enter a dissent, though he would not go the length of saying that his opinion was entirely altered.

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He had, however, felt the questions to be sufficiently doubtful to induce him to reserve them for the full Court.

Verdict quashed and set aside.

T. W. Ritchie, Q.C., for the prosecution.

W. H. Kerr, Q.C., for the defendant.

(J. K.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 17TH DECEMBER, 1879.

Coram HON. SIR A. A. DORION, C.J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

NOS. 112 AND 111.

THE SCHOOL COMMISSIONERS OF THE MUNICIPALITY OF THE TOWNSHIP OF ROXTON,

APPELLANTS;

AND

ISABELLA BOSTON ET AL.,

RESPONDENTS.

HELD:—That in a suit between rate payers and school commissioners, the fact that the rate payers are dissentients and the organisation of a corporation of dissentient school trustees may be proved by verbal testimony, where it is evident by receipts for school taxes granted by such dissentient corporation in favor of said rate payers, during a series of years, and by other circumstances, that such a corporation has *de facto* existed and claimed payment of school taxes in that capacity during many years.

CROSS, J. On the 27th December, 1872, the representatives of the late John Boston, heretofore Sheriff of the District of Montreal, brought an action in the District of Bedford against Wells H. Bates, *Adjudicataire*, the Corporation of the Township of Roxton and the School Commissioners of the Township of Roxton, to set aside the sale of three lots of land in the Municipality of that Township which they alleged had been illegally sold for taxes, being lots No. 11 and the east half of No. 16 in the Tenth Range, and lot No. 20 in the Eleventh

In their declaration they alleged that they were proprietors of the lands in question, and while possessed as such on the 4th of March, 1872, at Waterloo, in the County of Shefford, the lands in question were illegally exposed for sale by the secretary-treasurer of the County of Shefford for pretended non-payment of arrears of taxes alleged to be due thereon, and Wells H. Bates became the purchaser for the several specified prices therein mentioned, amounting in the aggregate to $64.05 which he paid, receiving from the secretary-treasurer certificates in due form, said lands having been wrongfully included in the list of lands in arrear for taxes.

That the sales were illegal, the plaintiffs having previously paid all municipal and school taxes lawfully chargeable thereon to the proper authorities, and that there was nothing due for such taxes upon the lands in question when they were so pretended to have been sold, although they had been wrongfully returned as owing arrears of such taxes.

That ever since the year 1858 there had existed in the Township of Roxton

a corporation of inhabitants professing a different faith from that of the majority of the inhabitants of the said Township, said corporation, composed of a minority, being represented by the trustees of the dissentient school, by which name they were organized, and were empowered by law to collect taxes from and due by dissentient inhabitants for school purposes in said Township.

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That John Boston was one of the dissentients who had notified the school commissioners of their dissent in 1858. He had taken part in the organization of the dissentients, and up to the time of his decease had continued to pay his school taxes to the dissentient school trustees, as had done also his representatives since his decease, all which the school commissioners for said Township well knew, and whereof they had had due notice.

That a month's notice of their action had been given.

They consequently concluded that the sale of the lands in question should be declared null, the property ordered to be restored to them, and the defendants condemned to pay them $500 damages.

Neither the Township of Roxton nor Bates pleaded to the action. The school commissioners alone made a defence.

They pleaded, 1st, a *défense en droit*, on the ground that the declaration did not show that the sale had been made at the request of the school commissioners for taxes unpaid to them.

This objection is not without plausibility, but as the lands must have been sold for some kind of taxes, either municipal or scholastic, the school commissioners being the parties to receive school taxes, unless lawfully paid to dissentient trustees, and all parties interested being put into the cause with the allegation that the school taxes had been lawfully paid to the dissentient trustees, the school commissioners suffered no injustice by being required to avow or repudiate the responsibility of the action of the secretary-treasurer in selling the land.

This was, however, reserved to be heard with the merits.

There was a further demurrer to that part of the declaration which claimed damages, in like manner reserved, but, as no damages were awarded by the judgment, the point thus raised is not now in question.

By a fourth plea the school commissioners contended that they had duly imposed the taxes for which the lands were sold; that the heirs Boston were not dissentients; that the secretary-treasurer of the school commissioners had transmitted a statement of taxes due on lands to the secretary-treasurer of the Township, which included the taxes due on the lands in question, but gave no orders for the sale of the lands, and could not be held responsible for the proceedings of the township nor the county councils, nor of those of their secretary-treasurers; that the heirs Boston had no interest because, before the 4th March, 1872, they had sold the lands.

They further pleaded a *défense en fait*.

In proof the respondents produced Thomas Brassard, the secretary-treasurer of the county of Shefford, Van Santford and Kimpton, two dissentient inhabitants of Roxton, and J. L. Lafontaine, who was secretary-treasurer of the municipality of the Township of Roxton as well as of the dissentient school trustees.

Brassard establishes that in the beginning of December, 1871, as secretary-

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treasurer, he received from Joseph L. Lafontaine, secretary-treasurer of Roxton, a statement shewing the amounts due for taxes on the different properties in Roxton, and what was due or purported to be due to the school commissioners. It was dated 13th November, purported to be in conformity to the assessment roll, and contained the names of the proprietors in arrear, among others the heirs Boston, the different lots chargeable, including those in question, and the amount due on each. He produces an extract from the list, signed by the secretary-treasurer. He states that, in conformity with his duty as secretary-treasurer, he advertised the lands indicated, and sold them in due course, 4th March, 1872, Bates becoming the purchaser of those now in question sold as pertaining to the heirs Boston. He paid the price, and Brassard gave him certificates somewhat in the form of Sheriff's deeds of sale, containing a *procès-verbal* of the proceedings taken and the sale for taxes under the provisions of the Municipal Code.

The amounts realized from the sales covered the taxes due on the lots sold as per the statement furnished by the secretary-treasurer of Roxton, with costs incurred, afterwards paid to the now appellants, the school commissioners, for school taxes; in part to Beauchemin, then secretary-treasurer, and in part to the Rev. M. Phaneuf on the secretary-treasurer's order. The lands were sold for school taxes and no other.

Van Santford, a resident and dissentient for about twenty years, swears to the organization and existence of the dissent for that length of time, as well as the continual payment for the same time of the school taxes by the dissentients directly to the dissentient school trustees, of whom he had himself been one for twelve to fifteen years. He also swears to having delivered in 1858 to the school commissioners a notice of dissent, signed by the late John Boston.

Kimpton, for many years another of the dissentient trustees, swears to the same facts.

Lafontaine, secretary-treasurer of Roxton, and at the time secretary-treasurer of the dissentient school trustees, swears to the receipt by him in October, 1871, from Beauchemin, the secretary-treasurer of the school commissioners, of the list of lands in Roxton in arrear for school taxes, which he produces. It includes the lands in question of the heirs Boston. This list was delivered in contemplation of the sale of lands for taxes to take place in March then next.

That in September, 1866, the plaintiffs, now respondents, had signified their notice of dissent to the school commissioners; that later they had given an additional notice, and ever since 1866 they had paid their school taxes to the dissentient school trustees, including their school taxes on the lands in question. He produces copy of the notice of dissent served on the school commissioners 20th September, 1866, accompanied with a bailiff's receipt for his charges for service, the list of lands sent him by Beauchemin, secretary-treasurer to the school commissioners, in October, 1871, in arrear for taxes, and to be sold in March following for arrears; also a copy of the dissent in regular form made by the respondents, the heirs Boston, dated 15th June, 1869, having on it a bailiff's certificate of service on the chairman of the school commissioners on the 17th June, 1869. He also verifies receipts produced showing the payment by the heirs Boston to the dissentient school trustees of the school taxes from 1867 to 1871 inclusively, during all which time he was their secretary-treasurer.

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The respondents objected to the organization or status of the corporation of the dissentient school trustees being proved by verbal testimony without the production of the record of proceedings; they also objected to secondary or verbal testimony of notices of dissent and services thereof. These objections were reserved.

A hearing being had, the Judge of the district of Bedford, on the 13th April, 1878, gave judgment for the plaintiffs, granting their conclusions to set aside the sales and for restoration of the lands to the plaintiffs, but refusing the demand for damages.

From this judgment, the present appeal has been instituted.

The appellants now submit:

1st. That the respondents should have proved, but have failed to prove, that there was a corporation of dissentient school trustees in the Township of Roxton.

2nd. That their *auteurs* were dissentients.

3rd. That the appellants had ordered the lands in question to be sold, and were responsible for the proceedings.

They contend that verbal testimony is inadmissible to support the pretensions of the respondents.

It would be conceded that on an enquiry by prerogative writ in the name of the Crown, or any equivalent proceeding, denying the right of the dissentient school trustees to act as a corporation, and claiming that they should be ousted from the exercise of such rights, it might be necessary for them to produce the titles of their erection or creation, but for the payment to them of school dues it is manifest that a *de facto* possession of status is a sufficient warrant for the exercise of their authority, and this may be established by verbal testimony, although the proof in this instance is not wholly confined to that species of evidence. The respondents have abundantly proved the existence of a dissentient organization and their own conduct in forming part of it; they have even in their notices named the trustees to whom their school taxes were to be paid, and two of these trustees have sworn to acting as such, and publicly collecting the school taxes from dissentients, including the respondents, for years past.

When the law, as in the present case, authorizes the formation of a corporation, and we find one in existence exercising the functions contemplated by the law, the adoption of the charter and the compliance with the necessary preliminaries will be inferred from the exercise of the corporate powers incident to its existence. Angell and Ames on Corporations, § 94, goes much further: "If "there has been a user of a corporate franchise by an association of persons, "their existence as a corporation can only be inquired into by the Government."

On the second point it is argued that a bailiff had no quality to serve a notice of dissent; but its service is proved by Lafontaine, and Van Santford swears to one being delivered as early as 1858. Again it is said that it is only signed by McLean Stewart, not shown to be authorised, but he was the husband of one of the heirs, and is shown by deeds which the appellants have produced, to have been acting as their agent in respect of these lands. And in any event such a necessary notice should be held good, if not repudiated; besides it has now been confirmed by adoption. It would be a singular state of society in

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which a person was not at liberty to indicate his own religious belief and the choice of his legal position as such, nor is it very rational to pretend that the respondents must have some authentic form of proof of their religious creed, and of that of their *auteurs*. It is proved that their *auteur* acted from the first as a dissentient, and that they have continued so to act; besides the discussion of this point is rendered unnecessary by the ruling on the first.

As to the third point: If the school commissioners deny that they approved the sale, or pretend that they did not authorise it, this would be an additional reason for its nullity, not a reason for supporting its validity. The lands were sold in their interest, and the proceeds paid to them. Being warned of how these proceeds were produced, they were in default in failing to disavow the sale, if they had not previously sanctioned it. But, under the circumstances, that sanction should be presumed. They now support the validity of a sale which ought to be declared invalid.

On the whole it is manifest that the respondents have throughout acted in good faith and according to their rights, while it can scarcely be said that the action of the appellants has been fair; they have relied for success on technicalities, which in the mind of the Court have proved insufficient.

They lastly raise the objection that, when the sale was made, two of the lots had been alienated by the heirs Boston, and being no longer proprietors, they had no right to bring the action; but they were rated as the persons liable for the taxes on the lots, and while the appellants should not deny the title so conceded to them, they have no interest in the proprietorship. If the respondents had sold the lots, they were still liable to guarantee them against evictions for arrears of taxes.

For these reasons this Court is of opinion that the principle on which the judgment of the Superior Court proceeded in this case was correct, and that the judgment should be confirmed; but inasmuch as the order to restore the lands to the plaintiffs was unnecessary, and might conflict with the record of the sales made by the respondents, the Court are of opinion that this order should be left out of the judgment, and will cause it to be reformed accordingly; but as no essential change is made, they consider it a confirmation of the judgment, and consequently award costs to the respondents.

RAMSAY, J. Two cases have come up before us, which give rise to a question of very general interest. The appellants contend that where there is a dissentient school municipality within the limits of any township or parish, the members of the dissentient body occupy so exceptional a position that they and each of them must be prepared at any moment to establish his dissentient status by proving his notice of dissent, his adherence to the dissentient body, and all the proceedings required by law to create the dissentient corporation. There is doubtless much to be said in support of this view; but reviewing the whole law and its objects, I do not think it was the intention of the Legislature to create an inequality of this kind. So long as there is no dissent, the one corporation exists; but the moment there is an expression of dissent taking the form required by law, then a new corporation of a public character arises, and its members acquire a status as fully recognized by law as that of the majority who do

not dissent. It seems to me that the existence of the corporation, and the status of its corporators as members of the corporation, are facts which can be proved orally; and that it is not incumbent on the corporator, in a suit for taxes by the other corporation, to prove his notice of dissent, or the observance of the formalities attending the formation of the corporation to which he belongs. I would, therefore, confirm the judgment appealed from.

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Judgment of S. C. confirmed.

Lacoste & Globensky, for appellants.
Bethune & Bethune, for respondents.
(S. B.)

COURT OF REVIEW, 1879.

MONTREAL, 31ST OCTOBER, 1879.

Coram JOHNSON, J., MACKAY, J., RAINVILLE, J.

No. 677.

Chaussé vs. *Larose*, and *Dame M. A. C. Symes*, creditor collocated, and *Dupré et al.*, contestants.

HELD:—That where the faculty is accorded to the purchaser, in a deed of sale of immoveables, to relieve any one of the lots described in the deed of the whole balance of purchase money (made payable by the deed with seven per cent. interest), by paying to the vendor at the rate of sixteen cents per foot of the lot to be discharged, the interest at the rate aforesaid must also be paid, in addition to the capital at said rate of sixteen cents per foot.

This was a revision of a judgment rendered by the Superior Court at Montreal (PAPINEAU, J.), on the 28th day of February, 1879, dismissing the contestation of contestants of the collocation of $977.20 in favor of said creditor, in the report of distribution of the monies arising from the sale by the sheriff of two lots of land.

These lots formed part of a larger number which had been originally sold by Henry Judah to Zéphirin Désormeau, and the collocation in favor of the creditor formed part of the balance of the purchase money which had been transferred to said creditor by Judah, and for the payment of which all the lots sold were mortgaged and hypothecated; such balance bearing interest at the rate of seven per cent. per annum.

In the deed of sale from Judah to Desormeau, it was declared as follows:—"Il est convenu que le dit acquéreur aura le droit de décharger aucune des lots sus vendus séparément de l'hypothèque générale sus mentionnée, en payant la balance du prix de chaque lot qu'il voudra décharger, au taux de seize centins par pied superficiel."

This collocation was contested by the contestants as being the first hypothecary creditors, according to the certificate of the registrar in rank after the said Dame M. A. C. Symes, on the ground that in the deed of sale from Judah to Desormeau it was stipulated that Desormeau should have the right to discharge any of the lots sold separately of the general hypothec resulting from the said deed, by paying the balance of the price of each lot that he wished to discharge at the rate of 16 cents per superficial foot.

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That Desormeau subsequently sold these two lots and transferred the balance of the price coming to him, to wit, $200, to Messrs. Chaussé, Dupré & Co., and that the contestants subsequently became the holders of the hypothecary claim under the deed of partage mentioned in the contestation and the registrar's certificate.

That as hypothecary creditors subsequent in rank to the said Dame M. A. C. Symes they had the right to pay her hypothecary claim on the lots sold and be subrogated in her rights.

That the two lots sold by the Sheriff contain a superficies of 4444 feet, which, at the rate of 16 cents a foot, would form a sum of $711.04. That they tendered this sum to the said Dame M. A. C. Symes and asked for subrogation, which was refused, and they consequently ask in their contestation that their tender be declared good and sufficient, and that the collocation of the said Dame Marie A. C. Symes be reduced to the sum of $711.04, and that they be collocated for the surplus.

The said Dame Marie A. C. Symes, by her answer to the contestation, said: That at the time of the adjudication to her of the said two lots at said Sheriff's sale (23rd May, 1878) there was due and owing to her under the said deed of sale and transfer the capital sum of $10,274.92, and interest thereon at the rate of 7 per cent. per annum since the 1st January, 1876, which would amount to the further sum of $1720.25, amounting together to $11,995.17.

That the said real estate was immediately previous to and at the time of the said adjudication specially affected and hypothecated in favor of said Dame M. A. C. Symes under the said deeds, and their registration for the above amount of capital and interest by special privilege of *bailleur de fonds*, and that the said collocation for $977.20 was and is in all respects right, legal and in conformity with the rank and privilege existing in her favor, under said deeds and their registration.

The said Dame M. A. C. Symes further contended that even if she was legally bound to accept from the contestants the amount mentioned in the contestation and *offres réelles* therein referred to, she could not be legally compelled to accept the same under any circumstances without payment to her at the same time of the interest on such capital amount at the rate of 7 per cent. from the said 1st day of January, 1876, until the date of the adjudication, and that the contestants wholly failed to pay such interest.

The learned judge, who rendered the judgment under Review, remarked as follows:—"Les intérêts forment partie du prix stipulé et pour connaitre le "total du prix, il faut y ajouter les intérêts. De même, pour connaitre la "balance du prix de chaque lot, il faut calculer ce prix au taux convenu de 16 "centins par pied superficiel de la contenance de ce lot, déduire le montant "donné argent comptant, puis calculer les intérêts sur la balance restant; et le "débiteur en payant cette balance et les intérêts sur cette balance, aura droit à "la décharge de ce lot particulier; autrement le débiteur en négligeant de "payer ses intérêts améliorerait sa position et pourrait toujours se libérer en "payant les 16 centins par pied, quand même les intérêts qu'il aurait laissé accu-"muler, excéderait avec la balance du capital le montant originaire du prix. Il

" n'y a rien dans l'acte qui puisse nous porter à lui donner une telle significa-
" tion."

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The following was the judgment of the Court of first instance :—

" La Cour * * * considérant que les offres faites par le dit contestant ont été insuffisantes en ce qu'il n'a offert le 22 de mai 1878, que seize centins par pied superficiel de lots vendus en cette cause, pendant que les intérêts calculés depuis le 31 de décembre 1874, jusqu'à la date des dites offres, ajoutés à la balance restée due sur chaque lot et constatée pour tous les lots ensemble, dans l'acte de vente de Henry Judah à Z. Desormeau, forment une somme plus considérable que celle offerte, et que la balance du prix de vente ne peut pas s'entendre du prix seul sans les intérêts qui en sont l'accessoire, et qui doivent être payés avant le capital à moins de stipulation au contraire ; et qu'on ne doit pas supposer que le vendeur aurait eu, sans qu'il l'ait exprimée clairement, l'intention de décharger une partie des immeubles vendus en considération d'une somme moindre que celle à lui due sur telle partie ;

" Renvoie et déboute la dite contestation, et maintient la dite collocation neuvième du susdit rapport avec dépens contre les dits contestants."

This judgment was unanimously confirmed by the Court of Review.

Judgment of S. C. confirmed.

Béique & Choquet, for contestants.

Bethune & Bethune, for creditors collocated.

(S. B.)

SUPERIOR COURT, 1879.

MONTREAL, 29TH NOVEMBER, 1879.

Coram JOHNSON, J.

No. 2189.

Perry vs. *Pell*.

AND No. 313.

Watson vs. *Thomson*, and E. Contra.

HELD :—1. That where a writ of attachment before judgment is improvidently sued out, the party whose effects are seized has a right to recover damages.

2. In the absence of proof of malice on the part of the person suing out the writ, nominal damages, and costs of the lowest class of the Superior Court, will be awarded.

3. Where it is evident that the party suing out the writ has acted maliciously, exemplary or vindictive damages will be awarded.

PER CURIAM :—There are two cases before me of the same general character : actions for damages for issuing writs of attachment without probable cause. The first is the case of Perry vs. Pell, in which the plaintiff, being about to change his residence, advertised his household furniture for sale, and the defendant who had an account against him, and could not get paid, made an affidavit such as the law requires to get an attachment before judgment, and took his writ and sent the bailiff to seize the property; the money was paid; and afterwards Mr. Perry brought his action to test the right of the defendant to take this severe recourse against him under the circumstances. The case was very

Perry vs. Pelt and Watson vs Thomson.

well argued before me on both sides, as to the probable grounds for the proceeding which is complained of; but it struck me at the argument that it had to be disposed of on a very plain principle that I had seen equally plainly elucidated by one than whom none is more competent to define or to illustrate the principles of our law. I refer to the eminently practical and sensible rule laid down by Chief Justice Meredith in the case of Powell vs. Patterson, reported in the 4th volume of the Quebec Law Reports. That was a case where the defendant, who had taken the attachment complained of, acted precisely as the defendant acted in the present one. The resemblance between the two cases is not only striking, but they may be said to be positively identical cases. The only point of difference was in favor of the defendant there, and against the defendant here, for Mr. Patterson, the defendant in the Quebec case, had no personal interest whatever to serve, but was acting simply as the assignee to an insolvent estate. The general facts of the two cases are undistinguishable the one from the other. Assuming the complexion of the evidence to be what was argued by the defendant's counsel, and that this account was overdue, and payment had been repeatedly asked for, still the case of the plaintiff there was the same. The Chief Justice states this part of the case of Powell vs. Patterson to have been that "very numerous applications were made for payment, plaintiff constantly promising to pay, but failing to do so, and in the month of March, 1876, an action was instituted by the defendant, as assignee of Boswell's estate, against the plaintiff. In the following month, that being about five months after the delivery of the last item in Boswell's account, the plaintiff being about to give up the business of keeping a restaurant and bar, and to change his residence to a house in the city, advertised an auction of his bar, hotel-fittings, and a lot of other goods." In rendering judgment the learned Chief Justice said: "It is contended on the part of the defendant, that as the claim was long past due; as repeated promises to pay it had been broken, and as the plaintiff was selling off without consulting his creditors in any way, the defendant had a right to swear that the plaintiff was secreting his property for the purpose of defrauding his creditors." It would be difficult to state more concisely, or at the same time more completely, the position taken by the defendant's Counsel in the present case. He said that Mr. Perry was going into a new business—that of floriculture, for which he had leased an extensive property, and that his client might never have got paid at all, if he had not taken out the attachment and got an order for his money on the auctioneers. That may have been very good tactics for getting his money; but I strongly dissent on the plainest and most logical grounds from its being any reason at all for saying that the plaintiff was secreting with intent to defraud; and that is what the law requires before it gives a right to attach. I might go into the details of this case to show that the circumstances negative the idea of its having been Mr. Perry's intention to defraud any one in giving up his town residence and removing to Longue Point; but I will merely conclude what I have to say in the very words used by the Chief Justice in the case referred to. He says:—"According to my view, the defendant acted upon the erroneous, but not uncommon, opinion that the writ of *saisie arrêt* before judgment may be used as a means of compelling dilatory debtors to pay doubt-

ful debts; whereas the law allows it to be used only against debtors guilty of fraud, as is evident from the fact that, in order to obtain such a writ, there must be an affidavit establishing that the defendant absconds, or is immediately about to leave the Province, or is secreting his property with intent to defraud his creditors."

As I have been guided by the learned Chief Justice's law in the case of Powell vs. Patterson, so I will be guided also by what he said in the matter of damages: for the two cases are singularly similar. The learned Chief said that in that case there were no grounds for giving vindictive damages, and no actual damage had been suffered. I say the same here: but he added, and I agree with him there also, "Still the plaintiff had a right to bring the action, were it only for the vindication of his character. The damages awarded ought at least to be sufficient to indemnify him for the loss of time incident to the litigation in which he has been involved by the illegal conduct of the defendant." The judgment in that case was for $20 damages; and they are the damages I give here. As to costs, they are a matter of discretion, and where damages above forty shillings sterling are given, costs, instead of following the amount of the judgment, may be allowed at a higher rate. That is the rule I have always followed, because it appears to me that to allow a plaintiff has right on his side, and yet to punish him for exercising it, would be unjust; and that is what would take place if I gave costs as in a case of $20; so I say costs as in lowest class action in this Court. In following the law laid down in Powell vs. Patterson the case of Shaw vs. McKenzie (23 L.C.J. 52) recurs to my mind. There I dismissed the plaintiff's action mainly because he himself informed his creditor there might be probable cause for believing he was about to leave the country with intent to defraud him. The case of Powell vs. Paterson was not cited in that case. Possibly the report had not appeared; but the plaintiff virtually contended for the same principle though the case was not cited. There, however, there was a decisive difference from the present case. The intention to leave was admitted there; the secretion is not admitted nor proved here. In Shaw vs. McKenzie the leaving being admitted, the only remaining point was the intent to defraud; and as to that, the debtor, instead of specifying any time for his return, only said his creditor might get his money the best way he could, which was much the same thing as saying his intention was to do just as he pleased, without regard to the rights of the creditor, who might therefore never get his money for years, nor perhaps at all.

The next case is one in which I am afraid it must be held not only that the plaintiff's right of action exists and must be maintained to a nominal amount, as in the case just disposed of, but it is one in which there are circumstances of considerable aggravation of the act of the defendant which is now complained of in this present action of damages by Mr. Thomson. The defendant, Mr. Watson, had long been in Mr. Thomson's employ, and in circumstances to which I will not further allude than to say that the treatment he received there ought to have inspired gratitude on his part, instead of prompting revenge. When Watson left the incidental plaintiff's employ, he sued him for a balance of wages, and was answered that while he was there, a large sum of money had disappeared from the safe, for which he was responsible. While that case was pend-

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ing, Watson took the proceeding now complained of, and the two cases were united, and it is by way of incidental demand in the attachment case that the present claim for damages is made. It is answered by Watson to the effect that he had reasonable and probable cause. Of course, the judgment in Watson *vs.* Thomson, which gave the former his wages, and rejected Thomson's plea of compensation, founded on the disappearance of his money through his servant's alleged negligence, is *res judicata* for me; but I cannot close my eyes to the grounds of that judgment, one of which was that Thomson was to lose his money, and the other was to be absolved, because there had been a constructive *remise* on the part of Thomson, whose conduct denoted that he had condoned his servant's act, and had kept him on in his employ afterwards. Such, then, was the position of the parties when this strong remedy was adopted by Mr. Watson against his late employer. The judgment had not at that time been given, and the thing was in litispendence, when Thomson advertised a sale of manufactured furniture; and upon that fact alone Mr. Watson made the affidavit required by law to obtain the process of attachment before judgment. I ought to add, however, that at this time (in April, 1879) Mr. Thomson's circumstances were proved at the trial to have been embarrassed. He was in arrear with his rent: and I allowed the evidence, not without hesitation, however, because loss of credit was one of the grounds on which damages were asked: but I pointed out then, and I repeat now, that Thomson's temporary want of money was no direct ground for taking the *saisie arrêt*: on the contrary, it was rather an aggravation than otherwise, if the seizure was made without legal grounds, for the law has not said that you can seize a man's property because he is hard up for money: but because he is a scoundrel—or, if that term is too strong, I will use the terms of the law—because he is "secreting his estate for the purpose of defrauding his creditors," which is clearly the act of a scoundrel. It is proved that not more than one-half of the manufactured furniture was to be offered for sale. The stock was worth $36,000, and in Watson's own handwriting in the books there was a surplus of $14,000, after allowing for debts and shrinkage. This sale, too, was largely advertised, as it had been Mr. Thomson's custom to do for several years, to the knowledge of Mr. Watson, although an annual sale had not taken place for the two previous years. In this state of facts I am called upon to say whether Mr. Thomson is entitled to damages from his former book keeper for taking this process as he did against his former employer. I find, then, that he took it without reasonable or probable cause. It appears to me to have been a vindictive and a cruel act; its consequences, according to the evidence, might have been much more serious than they were, if it had not been for Mr. Thomson's high character for integrity. I cannot overlook either that Watson swore in his affidavit that he had been informed of the facts he swore to, in order to get his seizure, and he has brought up no evidence whatever to show that such was the case. The blow to Mr. Thomson's character and credit among those who did not know him well must have been serious. This is proved by the most respectable testimony, and if I adopted the estimate of damage of some of the most respectable persons in Montreal who have testified, I should give very heavy damages indeed. As it

is, I feel obliged to give substantial damages, and my judgment is for the incidental plaintiff, $250 damages, interest and costs. Perry vs. Pell and Watson vs. Thomson.

Judgment for plaintiffs.

Bethune & Bethune, for Perry.
T. P. Butler, for Pell.
F. W. Terrill, for Thomson.
Hutchinson & Walker, for Watson.
(S.B.)

COUR DU BANC DE LA REINE, 1878.

MONTREAL, 18 SEPTEMBRE 1878.

Coram DORION, J. C., MONK, RAMSAY, TESSIER et CROSS, J J.

JOSEPH RASCONY,

(*Défendeur en Cour de première instance*),

APPELANT;

ET

LA COMPAGNIE DE NAVIGATION UNION,

(*Demanderesse en Cour de première instance*),

INTIMÉE.

LETTRES-PATENTES D'INCORPORATION—QUAND COMMENCE L'OBLIGATION DES ACTIONNAIRES.

JUGÉ :—Que les actionnaires incorporés par lettres-patentes sont ceux qui y sont nommés ainsi que ceux qui souscrivent après l'émission des lettres-patentes. Toute personne, non mentionnée aux lettres patentes, qui aurait souscrit des parts ou actions avant telle émission, ne peut être considéré comme actionnaire.

Le jugement dont est appel, a été rendu par la Cour Supérieure du district de Montréal, le 30 novembre 1876 (JOHNSON, J.) pour $500, montant de dix actions de $50 chaque, souscrit, suivant la déclaration de l'intimée, au fonds social de la dite compagnie intimée.

A cette action, l'appelant a plaidé par trois exceptions et une *défense en fait*. Deux de ces exceptions, la seconde et la troisième, ont été renvoyées, octobre 1876, (TORRANCE, J.) sur réponses en droit suivant le principe énoncé en Pacaud et Rickaby, 1 Q. L. R. p. 245, que les poursuites en annulation de lettres-patentes appartiennent exclusivement à la couronne, et ne peuvent être intentées par un particulier.

L'appelant a acquiescé à ce jugement, et n'a pris le présent appel que sur le jugement final. Par cette première exception l'appelant allègue :

Qu'il n'a jamais souscrit au fonds social de la compagnie intimée ;

Que vers juillet 1874 deux ou trois cents personnes ont signé un certain document, dans le but de former une association sous le nom de " Compagnie de Navigation Union," avec l'intention de demander des lettres patentes d'incorporation, et d'établir une ligne de bateaux à vapeur entre Québec et Montréal, mais que cette compagnie n'a jamais été organisée, ni incorporée, et qu'une certaine compagnie, portant le nom de " La compagnie de Navigation

Rascony et La Cie. de Navigation Union

Union," et composée de treize membres seulement, et dont l'appelant ne formait pas partie, a été incorporée en août 1874, et que cette compagnie, qui est entièrement différente de celle à laquelle l'appelant a souscrit, est l'intimée en cette cause ; et que si cette compagnie est en possession de livres et documents sur lesquels l'appelant a souscrit elle en est en possession illégalement.

L'intimée par ses repliques et réponses alléguait :

Que l'appelant, en souscrivant au fonds social originaire de l'intimée alors en voie de formation et reconnue comme " La Compagnie de Navigation Union," souscrivait et entendait souscrire au fonds social de l'intimée, et que les treize personnes dont parlait l'appelant, en obtenant les lettres-patentes incorporant l'intimée, agissaient pour l'appelant et pour tous les autres actionnaires et souscripteurs de l'intimée.

Que l'appelant s'était depuis reconnu comme l'un des actionnaires de l'intimée.

L'appelant a soumis qu'il ne pouvait être actionnaire de l'intimée avant l'époque de l'incorporation à moins que les lettres-patentes ne le constituassent tel, soit directement ou par implication ; que l'appelant n'était pas reconnu comme actionnaire par les lettres-patentes du 6 août 1874 ; et que l'intimée ne pouvait prétexter aucun acte directe ou indirecte de la part de l'appelant tendant à le compromettre et à l'impliquer dans les actes postérieurs aux lettres-patentes.

A la preuve, l'intimée a produit les lettres-patentes et un certificat du secrétaire-trésorier de la compagnie certifiant que l'appelant était actionnaire de la compagnie.

Le secrétaire-trésorier ayant été examiné par l'appelant et étant le seul témoin examiné dans la cause, a déclaré ce qui suit :

" Question. M. Rascony est-il actionnaire ?

" Réponse. Oui, monsieur, il est actionnaire pour dix actions de cinquante piastres chacune, qu'il a souscrites avant l'incorporation de la compagnie.

" Question. A-t-il reconnu devant vous qu'il était actionnaire ?

" Réponse. Je ne me rappelle pas qu'il l'ait reconnu devant moi."

Le jugement est comme suit : —

La Cour : &c.

" Considérant que l'appelant a prouvé qu'il n'a pas été actionnaire dans la Compagnie de Navigation Union," incorporée par lettres-patentes du sixième jour d'août 1874, l'intimée en cette cause, ni lors de la dite incorporation, ni depuis, et considérant qu'il y a erreur, etc. * *

" Cette Cour casse et annule le dit jugement, etc."

Jugement infirmé.

Doutre, Doutre, Rolidoux, Hutchinson & Walker, avocats de l'appelant.

Jetté, Beique & Choquet, avocats de l'intimée.

(J.L.M.)

SUPERIOR COURT, 1878.

MONTREAL, 17TH JANUARY, 1878.

Geddes et al. vs. La Banque Jacques Cartier

Coram PAPINEAU, J.

No. 501.

Geddes et al. vs. *La Banque Jacques Cartier et al.*

HELD:—That a Bank may lawfully make advances under the Banking Act (34 Vic. ch. 5) on the security of shares in an incorporated trading company, and sell such shares (in default of re-payment of the advances) on giving 30 days' notice to that effect.

PER CURIAM:—Les demandeurs poursuivent la banque Jacques-Cartier et la compagnie des chars Urbains de la cité de Montréal, et demandent qu'il soit défendu à la première de faire et à la seconde d'enrégistrer aucun transport par la banque Jacques-Cartier, d'aucune des parts ou actions dans la dite compagnie appartenant aux demandeurs et qui sont entre les mains de la dite banque comme sureté collatérale d'avances qu'elle leur a faites.

Les demandeurs allèguent avoir reçu de la banque Jacques-Cartier une lettre missive en date du 28 de juin 1875, les notifiant que les directeurs ont décidé de vendre les dites parts suivant la loi à moins que la créance de la banque ne soit payée. Ils allèguent de plus:

Qu'au dire de la banque il lui est dû une balance de $102,000, pendant que cette balance est sujette à débats entre les parties, et que la banque a des suretés collatérales des demandeurs pour une somme excédant de beaucoup le montant réellement dû, et nommément 845 parts dans le fonds de la compagnie de la valeur de $42,255, au pair, et 532 actions nouvelles dans la même compagnie sur lesquelles 75 par cent ont été payés et qui valent, au pair, $26,600.

Que les demandeurs sont prêts à payer à la banque ce qui lui est réellement dû sur rétrocession des suretés qu'elle détient, mais qu'elle réclame en sus $60,000 d'argent qu'elle a avancé aux demandeurs pour acheter, à son bénéfice, un certain montant de ses propres actions et que, sous prétexte de l'illégalité de ces achats, elle les répudie maintenant et veut en faire retomber la perte sur les demandeurs.

Qu'afin de contraindre les demandeurs à se charger de la responsabilité de cette perte, la banque menace de procéder sommairement comme en vertu des clauses de l'acte concernant les banques, et qu'elle a envoyé une seconde lettre aux demandeurs en date du 19 de juillet 1875, les notifiant que leurs dites actions seront vendues dans le délai de 30 jours à compter du 28 de juin 1875.

Les demandeurs allèguent que la banque n'a aucun droit, en vertu de la loi des banques, de faire cette vente sommairement, et que l'avis est illégal, et qu'ils ont déjà souffert un dommage de $5,000.

Et ils concluent à ce qu'il soit fait défense à la banque de faire le transport et à la compagnie de l'enrégistrer. Ils demandent aussi que la banque soit condamnée à leur payer $5,000 de dommages.

La compagnie n'a pas contesté l'action. La banque Jacques-Cartier fait une seule exception niant les allégués et spécialement que les demandeurs aient jamais eu l'avance de $60,000 pour acheter des actions de la banque.

Elle était, dit-elle, réellement créancière des demandeurs, le 28 de juin 1875,

Gadéon et al. vs. La Banque Jacques Cartier

au montant de $102,000 pour lesquelles elle s'était fait transporter, comme sureté collatérale, des actions dans la dite compagnie qui sont reconnus dans la loi et dans le commerce comme " effets publics," et elle se prétend en droit de les vendre sommairement.

Les parties ont admis par écrit, l'échange des lettres produites par les demandeurs et le fait qu'elles ont été écrites par ceux qui les ont signés, et reçues par ceux à qui elles étaient adressées.

Il résulte de ces lettres que $60,000 ont été avancées aux demandeurs, à même les deniers de la banque Jacques-Cartier, pour acheter des parts ou actions dans le fonds capital de cette dernière, avec le consentement des directeurs de la banque, aux termes de la lettre de l'ex-caissier, mais sans le consentement des mêmes directeurs suivant la lettre de l'administrateur temporaire de la banque Jacques-Cartier.

Comme ni l'une ni l'autre des parties n'a produit de résolution des directeurs autorisant ces achats que la loi ne permet pas, cette preuve est considérée comme insuffisante pour établir la responsabilité de la banque elle-même.

Il est allégué par les demandeurs que la banque se prétend leur créancière d'une balance de $102,000 qu'ils disent sujette à être débattue, mais qu'ils n'ont pas nié expressément. Cette dette de leur part est donc présumée admise quant à la décision du présent litige.

Les demandeurs, pour obtenir la somme ci-dessus, ont donné comme sureté collatérale à la défenderesse, des actions dans la banque de Montréal, dans la banque des Marchands, dans une compagnie de navigation, et enfin les parts en question de la compagnie des chars urbains de la cité de Montréal.

Ces dernières seules ayant été mentionnées dans l'action, nous n'avons pas à nous occuper des autres et particulièrement des actions dans les banques qu'il est expressément permis aux autres banques d'acquérir comme sureté collatérale (34 Vic., ch. 5, sect. 51.)

La seule question à déterminer est donc celle-ci : La banque Jacques-Cartier a-t-elle le droit de vendre sommairement les actions des demandeurs dans la compagnie des chars urbains, après un avis donné par lettre, au moins 30 jours avant de les vendre, d'après la sect. 51 du dit acte ?

En plaidant leur cause les demandeurs ont subdivisé cette question et l'ont posée comme suit : 1o. Les actions de la compagnie des chars urbains sont-elles des effets publics de la Province, aux termes de la dite section 51 ?

2o. Si ces actions ne sont pas des effets publics, la banque a-t-elle le droit d'en faire le commerce et de les vendre, de sa propre autorité, après avis, ou doit-elle les faire vendre par autorité de justice ?

Dans le langage légal, on entend, par effets de commerce, des titres de propriété ou des titres de créance transmissibles par endossement, ou par tradition de la main à la main, comme les billets à ordre, ou au porteur, les lettres de change, les bons ou débentures des gouvernements, des corporations municipales, ou autres corporations et compagnies autorisées par la loi à émettre des obligations, lettres de gage et coupons payables à ordre ou au porteur.

D'après notre législation on peut distinguer trois classes d'effets de commerce.

1o. Les effets privés émis par des particuliers ou des corporations, sur la garantie

de leurs propres biens seulement. Tels sont les billets à ordre, les billets au porteur, les traites, les lettres de change, les bons, les obligations, les lettres de gage, les débentures et autres titres de même nature, payables à ordre ou au porteur, émis par des corporations municipales et autres corps incorporés autorisés par la loi à le faire.

2o. Les effets publics par leur nature ou par la nature de la garantie qu'ils offrent à ceux qui les possèdent ; tels sont les bons du trésor ou autres titres émis par le gouvernement fédéral, par nos gouvernements provinciaux, par les gouvernements étrangers, ou même par les grandes compagnies ou corporations, avec la garantie de l'état. On les nomme " publics " parce que la fortune publique en garantit le paiement.

3o. Enfin les effets qu'on pourrait, dans un autre sens, appeler " publics " à raison de la publicité que la loi a voulu donner à leur émission, conservation et transmission. Les effets de cette troisième catégorie n'ont pas la même importance que ceux de la seconde, parce qu'ils n'ont pas la garantie de l'état même. Ce sont les bons, débentures ou autres titres de même nature, émanant des corporations municipales et autres corps incorporés, et enrégistrés au bureau d'enregistrement du comté où ces corporations municipales et autres corps ont leurs propriétés qui constituent la sureté du paiement de ces bons, débentures ou autres titres. Pour plus de sureté et afin d'éviter des fraudes, les sécrétaires des corps émettant ces bons, sont tenus d'en faire annuellement au gouvernement un rapport constatant, le nombre et la valeur des titres émis, le montant restant dû sur ces titres, la date de leur échéance, la valeur cotisée des immeubles appartenant à la corporation municipale ou autre corps incorporé qui les a émis. Le porteur a même l'avantage de faire enrégistrer son titre au bureau d'enrégistrement du comté afin de faire connaître son droit au public. (Vide chap. 84, Statuts Refondus, Canada.) Ni la plaidoirie, ni la preuve faites dans cette cause ne nous permettent de considérer comme effets publics, même à ce point de vue, les actions de la compagnie défenderesse.

Rien ne fait voir non plus que ces actions appartiennent à la première ou à la seconde des deux catégories que nous avons établies. On ne fait pas voir que ce soient des effets à ordre ou au porteur, ce qui constitue le caractère essentiel des effets de commerce, qu'ils soient publics ou privés. Ces actions ne sont pas émises ni garanties par l'état ou la province, elles ne sont donc pas " effets publics."

Ceux qui aimeraient à faire une étude approfondie de la matière consulteront avec profit l'ouvrage de Mollot sur les bourses de commerce ; le répertoire du Journal du Palais aux mots : " Effets Publics," " Effets de Commerce," " Sociétés," " Actions ; " les commentateurs de l'art. 35 du Code de Commerce ; les chartes d'incorporation de nos compagnies de chemins de fer, de nos corporations financières ; les statuts refondus du Canada, chapitres 14, 54, 55, 70, 83, 84.

Il est bon de remarquer que notre législation ne nous permet pas de comprendre, sous la dénomination d'effets publics, tous les titres de propriété ou de créance auxquels cette dénomination convient en France. Ainsi, en France, les actions elles-mêmes des grandes compagnies industrielles et financières *dont la*

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cote est autorisée à la bourse, sont considérées comme effets publics. Cela s'explique parce que ces actions sont *ordinairement* à ordre ou au porteur. En Canada, au contraire, les actions de nos compagnies ou sociétés industrielles ou financières ne sont transférables que par actes entrés sur leurs régistres privés. Au moins je n'en connais pas dont les actions soient transmissibles par simple endossement ou par livraison de la main à la main. Un très grand nombre, cependant, ont, par leur charte, le pouvoir d'émettre des bons négociables de cette manière.

Quand même nous pourrions considérer comme effets publics les actions de la compagnie des chars urbains de Montréal, la 51e section du statut 34 Vict., chap. 5, ne les a pas désignés par ces mots " effets publics de la Puissance, des Provinces de la Grande-Bretagne, ou de l'étranger." Si le législateur avait eu l'intention de les désigner par ces mots il n'aurait pas désigné nommément et immédiatement auparavant, " les bons ou débentures des corporations municipales *ou autres*," qui pourraient, plutôt que les bons de cette compagnie, être considérés comme effets publics. Non, ces derniers termes ne s'étendent qu'aux effets publics émis par la Puissance, par les Provinces, par la Grande-Bretagne, ou l'étranger, comme gouvernements, et non aux effets émis par des corps simplement autorisés par ces gouvernements à les émettre.

Il nous reste la seconde question : La banque Jacques-Cartier et nos banques en général, ont-elles le droit de prêter sur la garantie des actions de compagnie ou corporations ou sociétés par actions, et de vendre ces actions qu'elles ont prises en gage lorsque leurs créances ne sont pas payées ?

L'article 1971 de notre Code Civil pose comme règle générale : " le créancier ne peut, à défaut de paiement de la dette, disposer du gage. Il peut le faire saisir et vendre, suivant le cours ordinaire de la loi, en vertu du jugement d'un tribunal compétent et être payé par préférence sur " les deniers prélevés. " Néanmoins cette disposition ne s'étend pas aux banques relativement aux bois " qui leur sont donnés en gage conformément aux dispositions de l'acte de la " 29me. Vict., ch. 19."

Il ajoute : " Le créancier peut aussi stipuler qu'à défaut de paiement il aura " droit de garder le gage."

La section 40 de la 34 Vict., chap. 5, après avoir énuméré les affaires que la banque ne peut faire ni directement ni indirectement, dit qu'elle ne pourra " ni " s'engager ou être engagée dans aucun commerce quelconque, si ce n'est dans " celui des matières d'or et d'argent, des lettres de change, de l'escompte des " billets promissoires et des effets négociables, *et dans telles autres opérations* " *qui concernent en général le commerce de banque.*"

J'ai vainement cherché dans les chartes d'incorporation de nos banques la signification de ces derniers mots que je trouve répétés dans un grand nombre de ces chartes. Je n'y ai trouvé aucun indice qui pût me permettre d'en constater la signification précise, et j'ai eu recours à Grant on " Banks and Banking " et à Morse sur le même sujet.

Par le premier, je vois qu'en Angleterre, et par le second je vois qu'aux Etats-Unis, les banques reçoivent, comme sureté collatérale de leurs prêts, les actions des compagnies financières et industrielles. Elles se font transporter ces actions

Et Grant, qui donne en détail les différentes manières autorisées, pour les banques, de faire leur commerce, indique celle-ci avec assez de détail. En 1866, le Congrès des Etats-Unis, ayant à déterminer, pour les fins du revenu intérieur, ce qui constitue une banque ou un banquier, en a donné la définition suivante : " Every incorporated or other bank and every person, firm, or company having " a place of business where credits are opened by the deposit or collection of " money or currency, subject to be paid or remitted upon draft, check, order, " *or where money is advanced or loaned on stock*, bonds, bullion, bills of exchange " or promissory notes, or where *stocks*, bonds, bullion, bills of exchange, or pro- " missory notes, *are received for discount or for sale, shall be regarded as a* " *bank or banker.*"

Morse, on Banking, p. xxxviii.

Si chacune de ces opérations, faites habituellement, par une personne ou une société, en fait une banque ou un banquier, il ne peut paraître étrange qu'on la considère comme étant une opération " qui concerne en général le commerce " de banque." Le prêt sur actions et la réception d'actions dans le but de les escompter ou de les vendre sont donc des opérations qui concernent le commerce de banque. Elles sont donc permises à nos banques.

Comme nous venons de le voir, la nécessité, pour le créancier, d'obtenir jugement et de faire saisir et vendre son gage ne s'étend pas aux banques relativement aux bois qui leur sont donnés en gage. Nous devons dire qu'elle ne s'étend pas d'avantage aux actions du fonds social de toute autre banque, ni aux bons ou débentures des corporations municipales ou autres, ni aux effets publics de la Puissance, des Provinces, de la Grande-Bretagne ou de l'étranger, énumérés dans la 51me section de notre acte des Banques (34 Vict., ch. 5.) Cette disposition ne s'étend pas non plus aux céréales, aux denrées, aux marchandises ni aux autres articles représentés par les reçus, certificats, spécifications et connaissements énumérés dans la 46me section du même acte, lesquels céréales, denrées, marchandises et articles nos banques sont autorisées à vendre sommairement, sauf à remettre à leur propriétaire tout excédant du prix qu'ils auront rapporté, en sus du montant de la créance assurée par ces gages.

Il parait donc assez clair qu'on n'a pas voulu assujettir nos banques aux longueurs d'un procès et d'une exécution judiciaire pour réaliser leurs gages en général, et que cette énumération des effets privés et publics donnés comme gages, et que les banques peuvent vendre elles-mêmes, est plutôt exemplaire que limitative des différentes espèces de gages qu'elles peuvent ainsi réaliser sommairement. Et ce n'est pas pour exclure les actions dans le fonds social des corporations qu'elles ne se trouvent pas dans l'énumération des gages que les banques sont autorisées à vendre.

La preuve dans cette cause établit que presque toutes nos banques font des avances sur la garantie d'actions de nos compagnies ou associations incorporées, et que celles qui ne le font pas s'en abstiennent par défiance de la valeur vénale de ces actions, et non parce qu'elles doutent de la légalité de ce genre d'affaires.

Les demandeurs prétendent que l'avis qui leur a été donné est complètement irrégulier et illégal. Il n'ont pas jugé à propos de nous dire en quoi consiste

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cette irrégularité et cette illégalité. Ils reconnaissent avoir eu l'avis par lettre et la loi n'exige pas autre chose.

L'action est mal fondée et elle est renvoyée avec dépens.

Action dismissed.

E. Barnard, pour les demandeurs.

Laroste & Globensky, pour la défenderesse, la banque Jacques-Cartier.

(S. B.)

COURT OF APPEAL, 1844.

MONTREAL, 13TH JULY, 1844.

Coram HON. SIR JAMES STUART, CH. J., BOWEN, J., PANET, J., BEDARD, J., MONDELET (D.), J., FLETCHER, J.

No. 30.

HAMILTON ET AL., APPELLANTS;

AND

CHRISTIE, RESPONDENT.

HELD:—That where the proceeds of sale of an immoveable by the sheriff are insufficient to pay the claims in full of two rival claimants, having the same kind of privilege (namely, the one for arrears of *cens et rentes* accrued prior to the death of the *grevé de substitution*, and the other for arrears accrued since), the proceeds shall be divided *pro rata* between the claimants according to the amounts of their respective claims.

This was an appeal from a judgment rendered by the Court of Queen's Bench for the district of Montreal, on the 17th of June, 1843, Vallières de St. Réal, Ch. J., Rolland, J., Gale, J., Day, J., in the case No. 224, Christie vs. Trudeau.

The appellants were the executors and universal fiduciary legatees of the late Napier Christie Burton, who had been seignior of the seigniory of Delery, as *grevé de substitution* under the will of the late Gabriel Christie, and claimed to be paid by privilege the sum of £12, out of the sum of £22 8s. 8d., levied by the sheriff on the sale of an immoveable belonging to the defendant and situate in the said seigniory.

The respondent was the *appelé* under said will, and had a claim for seigniorial dues accrued since the death of Burton, exceeding in amount the balance of said proceeds of sale, and he consequently contested the claim of the appellants on the ground that he was the actual seignior, and entitled to be paid by privilege the full amount of his claim, before anything could be awarded to the appellants.

The following was the judgment of the Court of Queen's Bench:—

"The Court having heard the said plaintiff and the said opposants by their counsel upon the opposition and *moyens* of opposition of them, the said opposants, in their said capacities, and the contestation raised thereon by the said plaintiff, and having examined the proceedings and evidence of record, and seen the admissions given by the said plaintiff and opposants respectively, and upon the whole duly deliberated: It is considered and adjudged that the sum of £22 8s. 8d., current money of this province, levied by the sheriff of this district under the

writ of *Fieri Facias de Terris* issued in this cause on the 12th day of January, 1842, at the instance of the said plaintiff against the said defendant, and returned by the said sheriff into this Court on the 3rd day of February, 1843, be paid and distributed between the said plaintiff and the said opposants, George B. Hamilton and William King, in their said capacities, in equal portions, that is to say, that the said plaintiff be paid the sum of £11 4s. 4d., being the half of the said sum of £22 8s. 8d., and that the said opposants, George B. Hamilton and William H. King, in their said capacities be paid a like sum of £11 4s. 4d., being the other half of the said sum of £22 8s. 8d." Hamilton et al. and Christie.

The following was the judgment in appeal:—

"The Court * * * considering that the judgment of the Court below, now appealed from, in so far as the same directs that the proceeds levied in this cause be paid and distributed in equal portions between the appellants and the said William Plenderleath Christie, is erroneous, and that, by law, inasmuch as the said parties have therein equal privilege and right, they, the said parties, should and ought to have been collocated herein concurrently *pro rata* and in proportion to their respective rights in this cause;

"It is considered and adjudged, &c., that the judgment appealed from in this cause, namely, &c. &c., be, and the same is hereby reversed;

"And it is further considered and adjudged that on the sum of £22 8s. 8d., cy., return[illegible] said sheriff, &c., &c., they, the said George Barton Hamilton and William Henry King, in their said capacities, and he, the said William Plenderleath Christie, be, and do stand respectively collocated, concurrently, *pro rata*, and in proportion to the respective rights of the said parties in this cause;

"And it is further considered and adjudged by the said Court now here that the said appellants in their aforesaid capacities and the said respondent, William Plenderleath Christie, do severally bear and pay their own costs on the appeal in this cause."

Judgment of the Court of Queen's Bench reversed.

W. C. Meredith, Q.C., for appellants.

Wm. Badgley, Q.C., for respondent.

(S. B.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 22ND SEPTEMBER, 1879.

Coram HON. SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 45.

SCOTT ET AL., APPELLANTS;

AND

PAYETTE, RESPONDENT.

HELD:—That a report of *Experts* is no bar to the adduction of evidence generally in the case.

Sir A. A. DORION, Ch. J.: Par cette action l'intimé réclame des appelantes une balance sur le prix de constructions qu'il a faites pour elles d'après un contrat par écrit.

Abbott et al. and Payette.

Les appelantes ont répondu à cette demande : 1o. Que d'après une des stipulations de leur contrat elles avaient le droit de retenir 10 par cent sur le prix des ouvrages jusqu'à ce que les maisons fussent entièrement paracheyées ; qu'elles ne l'étaient pas encore, et que ces 10 par cent excédaient le montant dû à l'intimé. 2o. Que l'intimé ne leur a pas livré les maisons à l'époque convenue, et qu'elles ont, par là, souffert des dommages au montant de $1400, ce qui excède la réclamation de l'intimé.

Sur motion de l'intimé, et avant toute enquête, la Cour Supérieure a référé la cause à des experts en leur enjoignant de faire rapport si les bâtisses avaient été faites conformément au contrat ; quelles sommes les appelantes avaient payées à l'intimé, et si les bâtisses avaient été acceptées par les appelantes.

Les experts ont, dans leur rapport, établi que l'intimé avait exécuté son contrat moins quelques ouvrages qu'il n'avait pas terminés, et d'autres qu'il n'avait pas fait conformément à son contrat, et que sur la somme de $801.10 qui restait due sur le prix du marché, il avait droit à une somme de $550.76, plus à une autre somme de $68.20 pour ouvrages additionnels non compris dans le contrat. Ils ont de plus fait rapport que les appelantes avaient pris possession des maisons et qu'elles n'avaient pas souffert de dommages.

Sur ce rapport la cause fut inscrite pour enquête et mérite, et les appelantes ont produit un témoin ; mais sur objection faite de la part de l'intimé, la Cour a décidé que la cause ayant été référée à des experts, il n'y avait pas lieu d'entendre de témoins.

Sur le mérite le rapport des experts a été homologué, et les appelantes condamnées à payer les $550.76 mentionnées dans le rapport comme étant la balance due sur le prix du contrat, mais non les $68.20 pour ouvrages additionnels.

Il y a erreur dans ce jugement. La question de dommages réclamés par les appelantes n'a pas été référée aux experts qui ont pris sur eux de la décider sans y être autorisés. D'ailleurs les experts ne sont que des témoins, et comme les appelantes n'avaient pas eu occasion de faire leur enquête avant que des experts fussent nommés, elles avaient le droit de la faire après qu'ils eurent fait leur rapport.

Le jugement doit être infirmé et les parties renvoyées à la Cour Inférieure pour y procéder à leur enquête. Il est inutile de décider les autres questions soulevées par les parties sur le rapport même.

Judgment of S. C. reversed.

Lacoste & Globensky, for appellants.
Doutre & Doutre, for respondent.
(S.B.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 16TH SEPTEMBER, 1879.

Coram Hon. Sir A. A. DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 19.

ROSS, APPELLANT;

AND

MARCEAU, RESPONDENT.

HELD:—That the date of actual return of an action, as established by the paraph of the Prothonotary and the register of the Court, cannot be contradicted by affidavits.

Sir A. A. DORION, Ch. J.:—L'intimé a poursuivi l'appelante pour $104.72 pour le prix d'effets et marchandises qu'il lui a vendus.

L'action était rapportable le 12 septembre 1877, mais la paraphe du Protonotaire et l'entrée au régistre font voir que le writ n'a été rapporté que le lendemain, 13 septembre.

Le procureur de l'appelante avait fait, avant le rapport de l'action, quelques propositions d'arrangement de la part de sa cliente. Ces propositions ne furent pas agréées par l'intimé et son refus a été communiqué au procureur de l'appelante avec intimation qu'il eut à plaider à l'action. Il n'en a rien fait et l'intimé a obtenu jugement par défaut pour le montant de sa demande.

L'appelante se plaint de l'irrégularité du rapport de l'action.

Les procureurs de l'intimé ont produit des affidavits pour établir que le bref de sommation et la déclaration avaient été produits au greffe le 12 septembre 1877, quoiqu'ils n'eussent été entrées au régistre et paraphés par le Protonotaire comme ayant été rapportés le treize.

Le régistre de la Cour Supérieure et le certificat du Protonotaire que le bref n'a été rapporté que le 13 septembre 1877, ne peuvent pas été contredits par affidavit. Nous avons déjà décidé une question analogue dans la cause de Brooks et al., et Dallimore, 20 Jurist, 176, et aussi dans celle de Mallette et Lenoir, 21 Jurist, 84.

L'action a donc été irrégulièrement rapportée, et comme cette irrégularité n'a pas été couverte, l'appelante n'ayant pas comparue, le jugement qui a été prononcé contre elle doit être infirmé.

Mais comme le procureur de l'appelante a été notifié que ses propositions d'arrangement n'étaient pas acceptées et qu'il eut à fournir ses défenses, et qu'il a par conséquent eu occasion de se prévaloir en Cour Inférieure de l'irrégularité dont il se plaint en appel, cette Cour maintient l'appel, mais chaque partie payant ses frais.

Judgment of S. C. reversed.

Abbott & Co., for appellants.
Lareau & Lebeuf, for respondent.
(S.B.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 17TH DECEMBER, 1879.

Coram SIR A. A. DORION, C. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 169.

ANDRÉ MONTRAIT,

(*Defendant in the Court below*),

APPELLANT;

AND

DAME LUCY ANN WILLIAMS,

(*Plaintiff in the Court below,*)

RESPONDENT.

HELD:—1. An attorney *ad litem*, who prays for distraction of costs, acquires a personal right thereto in the event of the success of his client, and this right cannot be defeated by any agreement between his client and the adverse party or by payment of the costs to his client.

2. Where a suit is terminated by a *transaction* between plaintiff and defendant, instead of by a judgment, and the arrangement appears to the Court to have been intended to defraud the plaintiff's attorney of his costs, the Court will give effect to the *transaction* and allow the action to be discontinued, conditionally on payment of costs of suit by defendant to plaintiff's attorney.

3. Where an appeal involves merely a question of costs, the judgment will not, as a general rule, be disturbed.

The appeal was from a judgment of the Superior Court, Montreal, 28th June, 1878, JOHNSON, J., granting *acte* of the discontinuance of the action upon payment by defendant, now appellant, of the costs of the suit. The action was by a wife against her husband for separation from bed and board, and for an alimentary allowance.

JOHNSON, J., in rendering judgment in the Court below, made the following remarks:—"By an agreement executed before notary between the parties to this case on the 30th November last, the plaintiff discontinued her action without costs. The defendant now comes before the Court and asks for *acte* of this discontinuance, and of his consent to its terms. There has been no notice to the plaintiff's attorneys of this arrangement, and they cannot be bound by it. Their right is to continue the proceedings for the recovery of their costs, and it was obviously for the purpose of defeating this right that the arrangement was made between the parties without notice to the attorneys. On the general question of the right of parties to transact to the prejudice of the attorneys of record, there is a most unsatisfactory conflict of decisions. I have gone through all the cases; but there is none that goes the length of saying that in a case where the defendant was certainly about to be condemned to pay costs, he can in a clandestine manner get the plaintiff (who is his own wife) to absolve him, and then apply that arrangement so as to oust the attorneys who had fought her battle. On the contrary, while the general question seems pretty evenly balanced in all these decisions, there is a case that stands out from the others as authority that, where there is anything exceptional in the defendant's motives, as there clearly was here, he cannot get the benefit of an outside arrangement of this kind to the injury of the attorney. It is the case

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of Richards vs. Ritchie, 6 L. C. R., p. 98, in the strongest way condemnatory of the defendant's conduct. The action there was actually dismissed because the plaintiff had been got to sign an admission that he had no ground of action, nevertheless the defendant was condemned to pay the costs. After all, costs are a matter of discretion with the Court, and, on the whole, after reading the defendant's deposition, I can come to no other conclusion than to refuse his motion, and the other party asking costs, I grant *acte* of the discontinuance upon payment by defendant of the costs of the action."

The judgment of the Court below was in these terms:

"The Court, having heard the parties by their counsel upon the defendant's motion, filed on the 3rd of December last (1877), praying for act of record of the production made by him of an authentic copy of a deed passed before Mtre Jobin, Notary, on the 20th November, 1877, by which plaintiff discontinues, but without costs, her action in this cause, and also for act of record of defendant's consent to said discontinuation of the suit, without the condition imposed by Article 450 of the Code of Civil Procedure, of the payment of costs; having examined the proceedings and deposition of said defendant, and deliberated;

"Considering that it appears from the evidence of the defendant himself that the said deed was procured from his wife under circumstances that show his object and design were to defraud the plaintiff's attorneys, who never received any notice of the arrangement thereby made;

"Doth grant act, purely and simply to said defendant, of said production of deed and of his consent to said discontinuation of action, which said action is hereby declared to be terminated and at an end, but on payment of plaintiff's costs by said defendant, *distraits* to Messrs. Macmaster & Hall, attorneys for said plaintiff."

The appellant (defendant) complained of the condemnation to pay costs. The attention of the Court was also directed to the fact that plaintiff's attorneys had been substituted in the case for others, and were entitled to costs only from the time they came into the record.

Sir A. A. Dorion, C.J.—Sur une poursuite de l'intimée contre l'appelant, son mari, pour séparation de corps, la Cour Supérieure, par un premier jugement, lui avait accordé sa séparation et une somme de $25,000 pour lui tenir lieu de pension, le tout avec dépens dont distraction était accordée à ses procureurs.

Ce jugement a été infirmé pour quelqu'irrégularité de procédure, mais sans frais.

Depuis les parties ont transigé. L'appelant a payé à l'intimée une somme de $600 pour arrérages sur une provision qui lui avait été accordée, il lui a assuré une pension pour l'avenir, et l'intimée est convenue de discontinuer ses poursuites, chaque partie payant ses frais.

L'appelant a produit cet acte en Cour Inférieure et il a demandé que la cour enrégistrat la discontinuation de l'action de l'intimée, conformément à leur compromis et sans frais. Les procureurs de l'intimée se sont opposés à cette demande en autant qu'ils y étaient concernés pour leurs frais, dont ils avaient

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demandé et même obtenu distraction par un jugement précédent. Ils ont établi par le témoignage même de l'appelant, que la transaction avait été faite pour les frustrer de leurs frais.

La Cour Inférieure a, par son jugement, accordé la demande de l'appelant et elle a mis fin à l'action de l'intimée, conformément au compromis, mais en, par l'appelant, payant les frais de la demanderesse dont elle accorda distraction à ses procureurs.

L'appelant se plaint que ce jugement l'a condamné à payer les frais de l'intimée, et cela contrairement à la transaction faite entr'eux.

La distraction des dépens au profit des procureurs a toujours été considérée comme très favorable.

" Il est de l'intérêt public (dit Pothier, Traité du Mandat, No. 137) qu'un " procureur qui a été obligé de faire de grosses avances pour défendre une " pauvre partie dans un procès qu'on lui faisait injustement, ait un recours " assuré pour s'en faire rembourser par la partie qui a fait le procès injuste et " qui a été condamnée aux dépens."

L'auteur établit que la compensation ne peut jamais avoir lieu entre les sommes dues à la partie et les dépens qu'elle a été condamnée à payer par distraction aux procureurs de l'autre partie. Ces dépens, dont le procureur a obtenu distraction, sont censés n'avoir jamais appartenu à la partie qu'il représente, en sorte qu'il y a droit nonobstant les saisies-arrêts qui avaient été faites dans les mains de la partie qui les doit. (Ancien Denisart vo. Distraction, Nos. 5 et 6 ; Dubray et Joubert et autres, Sirey 1860, 2, 480.)

Le changement d'état qui fait perdre à la partie son privilége pour les frais ne fait pas perdre celui du procureur qui en a obtenu la distraction. (Ancien Denisart, No. 11.)

La distraction de dépens au profit de l'avoué a l'effet d'une saisie-arrêt entre les mains de la partie condamnée, (Dalloz, Rec. Per. 1833, 2, 33, note 2.)

" La demande en distraction (disent les auteurs de la nouvelle collection de " Denisart vo. Distraction, § 2, No. 1), équivaut à une opposition et empêche la " partie condamnée de payer les dépens à celle qui les a obtenus."

.....

" Elle devrait aussi, ce semble, empêcher la partie condamnée de transiger sur " les dépens, pourvu qu'elle fut demandée avant qu'il fut signé aucune tran- " saction."

Cependant l'avocat général Séguier prit des conclusions contraires à cette opinion dans une cause que l'auteur de cet article mentionne sans toutefois dire quelle en a été la décision.

Ici la demande en distraction a été faite par la déclaration même. Cette demande doit donc, à compter du jour où elle a été faite, avoir le même effet qu'aurait une saisie-arrêt ou une opposition en main-tierce, relativement à une créance éventuelle. Si, par l'événement, la créance devient exigible, le tiers-saisi, ou celui entre les mains de qui l'on a fait une opposition, doit la payer au créancier saisissant ou opposant. De même, lorsqu'il y a demande en distraction de frais, si la partie contre qui cette demande a été faite succombe, elle ne peut pas plus payer ces frais à la partie adverse, que si ses frais avaient été saisis

arrêtés entre ses mains par le procureur distrayant ; elle ne doit les payer qu'à lui. Elle ne peut même rien faire qui soit de nature à le priver injustement de ses frais sans s'exposer à payer une seconde fois.

Sans doute, cela n'oblige pas le tribunal à accorder des dépens contre une partie lorsque l'autre n'y a pas droit, ni à empêcher l'effet d'une transaction faite de bonne foi. Un demandeur pourra bien, sans le consentement de son procureur qui a demandé distraction de dépens, soumettre sa cause à des arbitres ou à des experts, se désister de tout ou partie de sa réclamation ; mais ce à quoi le procureur peut s'opposer c'est qu'une partie paie à l'autre partie les frais dont son procureur a demandé la distraction. Si l'appelant avait payé à l'intimé les $600 accrus sur sa provision, plus tous les frais encourus sur la poursuite, personne ne voudrait soutenir que ce paiement des dépens fait au préjudice des procureurs qui avaient demandé, et même obtenu par un jugement précédent, distraction de frais, eut été valable et que ces procureurs n'auraient pas le droit de réclamer le paiement de ces mêmes frais de l'appelant. Si au lieu de payer nommément les frais, il avait payé une somme fixe comprenant ou excédant le montant des frais, il serait censé avoir payé d'abord les frais, puis le surplus sur la réclamation de l'intimée, et il devrait, dans ce dernier cas, être responsable envers les procureurs de l'intimée de même que s'il lui avait séparément payé le montant des frais, au préjudice de ses procureurs distrayants.

C'est, du reste, ce qui a été jugé dans une cause rapportée dans Dallos, Rec. Per. 1833, 2, 33, sous des circonstances moins favorables au procureur que dans celle-ci.

Un jugement avait été rendu condamnant un mari à recevoir sa femme à son domicile et à payer au procureur de celle-ci tous les dépens.

Le mari appela de ce jugement et pendant l'appel, il y eut transaction par laquelle le mari se désista de son appel à la condition que la femme paierait tous les frais. Me. Girod qui avait obtenu distraction de frais demanda à intervenir sur l'appel pour protéger ses droits. Sa requête fut rejetée ; mais l'arrêt déclara qu'il avait son recours par action directe et lui réserva ce recours, et condamna le mari aux dépens de la requête en intervention malgré que la requête fût renvoyée.

Le jugement après avoir établi pourquoi le procureur ne pouvait pas être reçu partie intervenante, constate que la transaction n'a été faite que pour le frustrer de ses droits acquis, que n'ayant pas été partie à cette transaction, il conserve le droit de se faire payer des deux parties par action principale.

Voici le dispositif de cet arrêt :

" Rejette l'intervention, réserve à Me. Girod tous ses droits pour agir directe-
" ment et solidairement contre les époux Ch.... ; Au fond, ordonne que la cause
" soit rayée du rôle, condamne Ch.... à tous les dépens même ceux faits sur l'in-
" tervention."

La cour ne pouvait manifester plus énergiquement son opinion sur le droit du procureur, de recouvrer ses frais du défendeur, qu'elle ne l'a fait en le condamnant à payer même les frais d'une requête qu'elle rejetait.

Aussi Dallos qui accompagne cet arrêt d'une note explicative, fait-il les remarques suivantes : " Lorsqu'au lieu d'un arrêt, le litige se termine par une

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" transaction faite de bonne foi entre les parties, elle a toute la force de la " chose jugée et doit produire tous ses effets. Mais si les parties, voulant " frustrer l'avoué de ses droits, ont fait une transaction frauduleuse, ou se sont " entendues pour faire infirmer le premier jugement, la distraction prononcée " devra toujours avoir son effet.... .....car, une transaction entachée de dol, " quant à la partie qui le concerne, (l'avoué), est pour lui comme non-avenue."

Bioche, vo. dépens, No. 242, refère à l'opinion de Dallos qu'il approuve. Sirey 1833, 2, 524 rapporte cet arrêt et l'approuve.

Tous reconnaissent que le procureur ne peut être privé de ses frais par la connivence des parties et que le dol à son égard l'autorise à réclamer ses frais des deux parties. Dans cette cause, le mari n'avait cependant rien payé à sa femme lors de cette transaction, pendant qu'ici le compromis fait voir que l'appelant a payé $600 à l'intimée.

La principale différence entre le jugement cité par Dallos et celui rendu par la Cour Supérieure, consiste en ce que, dans le premier cas, la Cour d'Appel n'a pas voulu permettre au procureur de l'intimée d'intervenir pour continuer l'appel en son nom pour ses frais, et qu'elle l'a renvoyé à se pourvoir par action directe, pendant que dans cette cause-ci, la Cour Supérieure a permis aux procureurs de l'intimée de conclure à ce que la cause ne fut discontinuée qu'à la condition pour l'appelant de leur payer leurs frais, dont distraction avait été demandée par l'action même et accordée par un jugement précédent, annulé il est vrai, mais à raison d'irrégularités de procédure.

Les deux jugements reconnaissent le droit des procureurs d'exiger le paiement de leurs frais par distraction, et il n'y a de conflit que sur le mode de les recouvrer.

Le jugement de la Cour Supérieure a le grand avantage de mettre fin et d'une manière sommaire à un incident que les parties ont fait surgir dans la cause même, sans qu'il soit nécessaire de subir les lenteurs et les frais d'une nouvelle demande. Il est de plus conforme à la jurisprudence suivie dans nos cours.

Stigny et Stigny et al., 2 Rev. de Lég. 120. Peltier et Landril, Idem 120. Richard et Richard, 6 L. C. R. 98. Gauthier et Lemieux, 2 L. C. R. 273. O'Connell and the City of Montreal, 4 L. C. J. 56. Darche et Dubuc, 1 L. C. R. 238. Charlebois et Coulombe, 7 L. C. J. 300. McCulloch et Hatfield, 7 L. C. J. 229. Esson et Black, Robertson's Digest, 114. Anderson et Kerby, No. 838, S. C. Montréal 1877.

Ces causes citées par les avocats de l'intimée prouvent que la pratique a été invariable de protéger les procureurs contre les manœuvres des parties pour les priver de leurs frais. Il y a cependant une cause de Guay vs. Guay (2 Revue Leg. 120,) où le contraire parait avoir été jugé, mais les circonstances pouvaient être différentes.

Si la jurisprudence n'était pas si bien établie, il y aurait encore un autre motif pour renvoyer cet appel. C'est qu'il ne s'agit ici que d'une question de frais. L'appelant se plaint qu'il a été condamné à payer les frais de l'intimée, lorsque l'action aurait due être discontinuée sans frais ou chaque partie payant ses frais.

Nous avons déjà eu plusieurs fois, l'occasion de dire que les frais étaient toujours

à la discrétion du tribunal saisi du litige. Il y a peu de causes dans lesquelles cette Cour serait disposée à infirmer un jugement pour une simple question de frais. Il est vrai qu'ici l'appelant allègue qu'il y a au fond une question de principe et que la Cour Inférieure a jugé à l'encontre de la convention des parties ; mais nous avons vu dans la cause que nous avons déjà mentionnée, jusqu'à quel point les cours en France poussent l'exercice de la discrétion qu'elles ont quant aux dépens, puisque dans cette cause l'appelant a été condamné à payer les frais d'une procédure dont il avait obtenu le rejet.

Nous n'avons pas ici à aller aussi loin, et nous croyons que sous quelque point de vue que l'on envisage cette question, le jugement de la Cour Inférieure doit être confirmé.

RAMSAY, J. The judgment is based on Art. 450 C.C.P. Whatever be its merits, that article evidently has no bearing on the question. It is an article simply setting forth that a party may discontinue his action before judgment on payment of costs without the consent of his adversary. The case before us is that of both parties discontinuing the proceedings without costs, by consent. The one is a faculty accorded to the plaintiff on a certain condition, the other is the exercise of a common right. Now the question that is presented to us is this: Can a plaintiff, represented by an attorney who has prayed for distraction of costs, abandon his suit in such a way as to defeat the attorney of a possible recourse he might have against the defendant, and can the Judge condemn one of the parties, on the demand of the attorney, to pay the costs?

The question is one of some difficulty. It is apparent that an understanding of this sort might be come to between the parties purely with the view of defeating the attorney on one side of his costs, as appears to have been intended in this case. On the other hand, it is difficult to see how the Court can adjudicate on an unfinished case as to the party on whom the liability to pay costs should fall, nor do I see that there is any necessity to admit a proceeding so open to objection. By article 205 C.C.P., no one can revoke the powers of his attorney without paying him his fees and disbursements, and therefore there can be no discontinuance in the suit without the attorney's privity and consent. The case of *Ryan & Ward* was before the Code, and when the rule of art. 205 was only a rule of practice. Of course, the general principle, that without fraud the parties may settle without their attorney, is unquestioned. This appears to me a sufficient check for all practical purposes, and I think the judgment below should have gone to the extent of refusing to file the discontinuance, without condemning the appellant to costs.

And so it was decided in *Lafaille & Lafaille*, in *Quebec Bank & Paquet*, and in *Cantongué & Perrin*, that the attorney could not continue the case for his costs after discontinuation of the suit. The dissent in *Ryan & Ward* takes exactly the ground which I think the judgment in the Court below should have taken.

By the form of the judgment it seems not to go further than to permit the discontinuance on payment of plaintiff's costs, and this would be in my view a correct judgment. I therefore do not dissent from the dispositive of the judgment, but from the motives.

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MONK, J., thought that in these questions of costs it was very difficult to lay down a general rule. His Honor did not think the Court was laying down an iron rule that would bind it in future. It was a matter in which the Court exercised a discretion, and each case must turn on the particular circumstances.

The judgment is as follows:

"The Court, etc.

"Considering that it appears from the evidence of the appellant himself, defendant in the Court below, that the deed passed before Maître Jobin, notary, on the 30th day of November, 1877, by which the respondent, plaintiff in the Court below, discontinued, but without costs, her action in this cause, was procured from his wife under circumstances that show his object and design were to defraud the plaintiff's attorneys, who never received any notice of the arrangement thereby made;

"And considering that in the dispositif of the judgment appealed from, to wit, the judgment rendered at Montreal on the 28th day of June, 1878, there is no error, doth confirm the same with costs, and doth grant *acte* purely and simply to said appellant, defendant below, of said production of deed, and of his consent to said discontinuation of action, which said action is hereby declared to be terminated and at an end; but on payment of such of the plaintiff's costs as have been incurred from the date of the appearance of Messrs. Macmaster and Hall as her attorneys in this cause, and of which costs distraction is awarded to her said attorneys (Mr. Justice Ramsay dissenting)."

Judgment confirmed.

Judah & Branchaud, for appellant.

Macmaster, Hall & Greenshields, for respondent.

(J. K.)

COURT OF REVIEW, 1880.

MONTREAL, 31st JANUARY, 1880.

Coram TORRANCE, J., RAINVILLE, J., PAPINEAU, J.

No. 849.

Beaudry vs. *Lafleur*, and *Perry*, Oppt.

HELD:—That a cart voluntarily left in the possession of a tenant by a third party during several months is liable to seizure and sale by the landlord in payment of his rent, in the absence of proof that the landlord had reason to know that the tenant was not proprietor of the cart.

This was an opposition *afin de distraire* by a party claiming to be the owner of a cart seized in the cause as the property of the defendant, and was contested by the plaintiff.

On the 30th September, 1879, the Superior Court at Montreal (Jetté, J.) pronounced the following judgment:

"La Cour * * *

"Considérant qu'il est établi en preuve que la voiture (tombereau) réclamée par le dit opposant a été par lui déposée volontairement chez le défendeur vers le mois de juillet 1878, et qu'elle y a été laissée jusqu'au 7 avril 1879, époque où elle a été saisie;

" Considérant qu'il n'a pas été prouvé que le demandeur eut aucune raison de croire que le dit tombereau n'était pas la propriété du défendeur son locataire, et qu'il n'a pas été informé qu'il ne fut pas la propriété du dit défendeur ;

" Considérant qu'il résulte de la preuve faite que la dite voiture aurait pu appartenir aussi bien au défendeur qu'à toute autre personne, et que sa possession par le défendeur n'avait rien d'extraordinaire ;

" Considérant que la dite voiture a garni les lieux loués par le demandeur au défendeur, tel que susdit, du mois de juillet 1878 au mois d'avril suivant, qu'elle a été saisie dans les dits lieux et dans les délais légaux fixés pour l'exercice du privilége du propriétaire ;

" Considérant en droit que le privilége du propriétaire pour son loyer affecte tous les biens meubles garnissant la maison louée lors même qu'ils appartiennent à des tiers, à moins qu'[illegible] propriétaire ait eu juste cause de savoir qu'ils n'appartenaient pas à son [illegible] qui n'a pas été établi en cette cause), maintient la dite contestation [illegible] et renvoie la dite opposition avec dépens."

The Court of Review unanimou[illegible]rmed the judgment.

Judgment of S. C. confirmed.

Cruickshank & Cruickshank, for opposant.

Bonin & Archambault, for plaintiff.

(S. B.)

PRIVY COUNCIL, 1880.

LONDON, ENG., 15TH APRIL, 1880.

Coram SIR JAMES W. COLVILE, L. J., SIR BARNES PEACOCK, L. J., SIR MONTAGUE E. SMITH, L. J., SIR ROBERT P. COLLIER, L. J.

CUSHING,

AND

DUPUY,

APPELLANT;

RESPONDENT.

HELD :—1. That the Dominion Parliament had power to take away the right of appeal to the Supreme Court and the P. C., as they claimed to do by the 40 Vic. ch. 41, sec. 28, amending "The Insolvent Act of 1875."

2. That notwithstanding said Statute, the Queen, as an act of grace, could nevertheless allow an appeal to Herself in Her P. C. from a judgment in a case in insolvency under said Act rendered by the Court of Q. B., and that in the present instance the appeal was rightly allowed.

3. That on the merits of this case the appeal must be dismissed on the ground that the sale invoked by the appellant was simulated, and was in reality a pledging of the moveables claimed to have been sold rather than a veritable sale of them, and that the transaction had not the *indicia* of a *bonâ fide* sale.

This was an appeal from the judgment of the Court of Q. B. at Montreal, reported at p. 201 of the 22nd L. C. J.

The following was the judgment of the Judicial Committee of the P. C. :—

This appeal is from a judgment of the Court of Queen's Bench of the Province of Quebec, reversing the judgment of a judge of the Superior Court,

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which had been given in the appellant's favour, in certain proceedings in insolvency instituted under an Act of Parliament of the Dominion of Canada, intituled "An Act respecting Insolvency" (38 Vict., c. 16).

These proceedings were commenced by a petition of Mr. Cushing, the appellant, to the Superior Court, praying that Mr. Dupuy, the official assignee of the estate of the insolvent firm of McLeod, McNaughten and Léveillé, might be ordered to deliver up certain property seized by him, as such assignee, under a writ of attachment, on the ground that it had been sold to the petitioner by the insolvents before their insolvency.

An application to the Court of Queen's Bench for leave to appeal to Her Majesty in Council was refused, on the ground that, under the Insolvency Act, its judgment was final. The appellant then presented a petition to Her Majesty for special leave to appeal, which Her Majesty was advised by their Lordships to grant, reserving to the respondent power to raise at the hearing the question of Her jurisdiction to entertain the appeal.

That question, which has been fully argued at the Bar, raises two points; first, whether the Court of Queen's Bench was right in holding that the appeal to Her Majesty in Council, given *de jure* by Art. 1178 of the Code of Civil Procedure, from final judgments rendered on appeal by that Court, is taken away by the Insolvency Act; and, secondly, if that be so, whether the power of the Crown, by virtue of its prerogative, to admit the appeal is affected by that Act.

The 128th section of the Insolvency Act enacts as follows:—

"In the Province of Quebec all decisions by a Judge in Chambers in matters of insolvency shall be considered as judgments of the Superior Court; and any final order or judgment rendered by such Judge or Court may be inscribed for revision, or may be appealed from by the parties aggrieved, in the same cases and in the same manner as they might inscribe for revision or appeal from a final judgment of the Superior Court in ordinary cases under the laws in force when such decision shall be rendered."

By the 28th section of a subsequent Act of the Parliament of Canada, 40 Vict., c. 41, it is enacted that the 128th section of the former Act shall be amended by adding thereto the following words:—

"The judgment of the Court to which, under this section, the appeal can be made shall be final."

This Court, in the Province of Quebec, is the Court of Queen's Bench.

The whole question turns on these added words, and in considering their effect on the right of appeal to the Crown given *de jure* by the Code, two things are to be regarded; (1), the power of the Dominion Parliament to abrogate this right; and (2), if it had the power, whether it intended to exercise it.

The first of these questions depends upon the construction of the British North American Act, 1867, which confers and distributes legislative powers. By section 91 of that Act, exclusive legislative authority in certain matters is conferred upon the Parliament of Canada, and by section 92 exclusive authority in certain others upon the Provincial Legislatures.

Section 91 is as follows:—

"It shall be lawful for the Queen, by and with the advice and consent

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of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and, for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say,—

"21. Bankruptcy and Insolvency."

Section 92 enacts,—

"In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say,—

"13. Property and civil rights.

"14. The administration of justice in the Province, including the constitution, maintenance, and organization of provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

It was contended for the appellant that the provision of the Insolvency Act interfered with property and civil rights, and was therefore *ultra vires*. This objection was very faintly urged, but it was strongly contended that the Parliament of Canada could not take away the right of appeal to the Queen from final judgments of the Court of Queen's Bench, which, it was said, was part of the procedure in civil matters exclusively assigned to the Legislature of the Province.

The answer to these objections is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the Provinces, so far as a general law relating to those subjects might affect them. Their Lordships therefore think that the Parliament of Canada would not infringe the exclusive powers given to the Provincial Legislatures, by enacting that the judgment of the Court of Queen's Bench in matters of insolvency should be final, and not subject to the appeal as of right to Her Majesty in Council allowed by Art. 1178 of the Code of Civil Procedure. Nor, in their Lordships' opinion, would such an enactment infringe the Queen's prerogative, since it only provides that the appeal to Her Majesty given by the Code framed under the authority of the Provincial Legislature, as part of the civil procedure of the Province, shall not be applicable to judgments in the new proceedings in insolvency which the Dominion Act creates. Such a provision in no way trenches on the Royal prerogative.

Then it was contended that if the Parliament of Canada had the power, it

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did not intend to abolish the right of appeal to the Crown. It was said that the word "final" would be satisfied by holding that it prohibited an appeal to the Supreme Court of Canada, established by the Dominion Act of the 38th Vict., c. 11. Their Lordships think the effect of the word cannot be so confined. It is not reasonable to suppose that the Parliament of Canada intended to prohibit an appeal to the Supreme Court of Appeal recently established by its own legislation, and to allow the right of immediate appeal from the Court of Queen's Bench to the Queen to remain. Besides the word "final" has been before used in Colonial legislation as an apt word to exclude in certain cases appeals as of right to Her Majesty. (*See* the Lower Canada Statute, 34 Geo. 3, c. 30.). Such an effect may, no doubt, be excluded by the context, but there is none in the enactment in question to limit the meaning of the word. For these reasons their Lordships think that the Judges below were right in holding that they had no power to grant leave to appeal.

The question of the power of the Queen to admit the appeal, as an act of grace, gives rise to different considerations. It is in their Lordships' view unnecessary to consider what powers may be possessed by the Parliament of Canada to interfere with the royal prerogative, since the 28th section of the Insolvency Act does not profess to touch it, and they think, upon the general principle that the rights of the Crown can only be taken away by express words, that the power of the Queen to allow this appeal is not affected by that enactment. In consequence, however, of the decision in *Cuvillier* vs. *Aylwin* (2 Knapp's P. C., 72) which has been relied on as an authority opposed to this view, it becomes necessary to review that case in connection with the subsequent decisions on the subject.

The question in *Cuvillier* vs. *Aylwin* arose upon the Lower Canada Colonial Act, 34 Geo. 3, c. 6, which enacted that the judgment of the Court of Appeals should be final in all cases under the value of 500*l*., and an application for special leave to appeal in a case under that value was refused by a Committee of the Privy Council. The remarks attributed to the Master of the Rolls in his judgment rejecting the petition are directed to one aspect only of the question, viz., the power of the Crown with the other branches of the Legislature to deprive the subject of one of his rights. No allusion was made to the principle that express words are necessary to take away the prerogative rights of the Crown, nor to the provision contained in the statute itself, that nothing therein contained should derogate from any right or prerogative of the Crown. This case, moreover, if not expressly overruled, has not been followed, and later decisions are opposed to it.

In re Louis Marois (reported in 15 Moore, P. C. 189), upon an application for leave to appeal from a judgment of the Court of Queen's Bench for Lower Canada, Lord Chelmsford, in giving the judgment of this Committee, after stating that in *Cuvillier* vs. *Aylwin* the very point was decided against the petitioner, said:—

"If the question is to be concluded by that decision, this petition must be at once dismissed, but upon turning to the report of the case, their Lordships are not satisfied that the subject received that full and deliberate con-

sideration which the great importance of it demanded. The report of the judgment of the Master of the Rolls is contained in a few lines; and he does not appear to have directly adverted to the effect of the proviso contained in the 43rd section of the Act on the prerogative of the Crown."

Leave to appeal was granted in that case, subject to the risk of a petition being presented to dismiss the appeal as incompetent. Although their Lordships, in granting this leave, said that they desired to intimate no opinion whether the decision in *Cuvillier* v. *Aylwin* could be sustained or not, it is obvious that, at the least, they regarded it as being open to review.

In *Johnston* vs. *The Minister and Trustees of St. Andrew's Church* (L. R. 3 Appeal Cases 159), upon an application for special leave to appeal against a judgment of the Supreme Court of Canada, the effect of the 47th section of the Act, establishing that Court, which enacted that its judgments should be final and conclusive, saving any right which Her Majesty may be graciously pleased to exercise by virtue of her royal prerogative, came in question, and the Lord Chancellor, in giving the judgment of this Committee, said:—

"Their Lordships have no doubt whatever that assuming, as the petitioners do assume, that their power of appeal as a matter of right is not continued, still that Her Majesty's prerogative to allow an appeal, if so advised, is left entirely untouched and preserved by this section."

Although leave to appeal was in this instance refused, on the ground that the case was not a proper one for the exercise of the prerogative, the opinion cited above is virtually opposed to the decision in *Cuvillier* vs. *Aylwin*, where, it is to be remembered, the Act in question likewise contained a saving of the prerogative of the Crown.

Another case lately before this Committee requires consideration, Théberge and mother vs. Landry (L. R. 2 Appeal Cases, 102). It was an application for special leave to appeal against a judgment of the Superior Court of Quebec upon an election petition, by which the applicant had been unseated for corrupt practices. By the Quebec Controverted Elections Act, 1875, the decision of controverted elections, which formerly belonged to the Legislative Assembly itself, was conferred upon the Superior Court, and by Section 90 of the Act it was enacted that the judgment of that Court sitting in review should not be susceptible of appeal. It was held by this Committee that there was no prerogative right in the Crown to review the judgment of the Superior Court upon an election petition, and the application was refused. This decision turned on the peculiar nature of the jurisdiction delegated to the Superior Court, and not merely on the prohibitory words of the statute. It was distinctly and carefully rested on the ground of the peculiarity of the subject matter, which concerned not mere ordinary civil rights, but rights and privileges always regarded as pertaining to the Legislative Assembly, in complete independence of the Crown, so far as they properly existed; and consequently it was held that, in transferring the decision of these rights from the Assembly to the Superior Court, it could not have been intended that the determination in the last resort should belong to the Queen in Council. But, whilst coming to

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this decision, the Lord Chancellor, in giving the judgment of the Committee, affirmed the general principle as to the prerogative of the Crown:—

"Their Lordships wish to state distinctly that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away, except by express words; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shown to take away that prerogative."

It was not suggested that an appeal would not have lain to the Queen in Council under the Insolvency Act of 1875; and it was not until two years afterwards that the Amending Act of 1877, which is said to have taken it away, was passed.

The learned Counsel for the appellant drew attention to the Act of the Parliament of Canada, 31 Vict., c. 1, which enacts rules of interpretation to be applied to all future legislation, when not inconsistent with the intent of the Act or the context.

Sub-section 33 of section 7 of that Act is as follows:—

"No provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs, or successors, unless it is expressly stated that Her Majesty shall be bound thereby."

The Insolvent Acts are to be construed with reference to this provision, which is substantially an affirmance of the general principle of law already adverted to.

Applying that principle to the enactment in question, their Lordships are of opinion that, as it contains no words which purport to derogate from the prerogative of the Queen to allow, as an act of grace, appeals from the Court of Queen's Bench in matters of insolvency, Her authority in that respect is unaffected by it.

The order for leave to appeal granted in the present case will consequently stand.

Upon the merits of the appeal the following are the principal facts:—Messrs. McLeod, McNaughton and Léveillé, who carried on business as brewers in Montreal, became insolvent on the 19th July, 1877, and on the same day their estate and effects, including the plant, material and effects which are the subject of these proceedings, were seized by the respondent, as official assignee under a writ of attachment in insolvency. Thereupon the appellant, who is a notary, demanded from the assignee the delivery of the above-mentioned plant and effects, on the ground that they had been sold to him by the insolvents on the 14th March, 1877, about four months before the insolvency. He claims them as owner under a contract of sale, in the petition which gives rise to this appeal.

The contract on which the appellant relies is contained in a notarial instrument, by which the insolvents purport to bargain, sell and assign to the appellant the plant, material, furniture and effects (described in detail in the bill of sale) lying and being in and about their brewery. Some of these effects are valued in the bill of sale, the total of these values amounting to $4,800; others are not valued. The consideration is thus stated in the deed:—

"The present bargain and sale is made in manner aforesaid, for and in consideration of the sum of one dollar currency, cash in hand, paid at the execution hereof, and for other good and valuable consideration heretofore had and received, the receipt whereof is hereby acknowledged, whereof quit, and in further consideration that the said purchaser shall endorse the paper of the firm of McLeod, McNaughton and Léveillé, which he agrees to do on demand, for a sum which, together with present unsecured endorsements, shall not exceed in all two thousand dollars."

Authority is given to the appellant by the deed to take possession of the effects.

On the same day a lease was made by the appellant to the insolvents of the same plant and effects for three years at a yearly rent of $100.

The petition of the appellant alleges that he took possession of the effects, but in fact no removal or change of possession whatever took place, and the plant and effects remained in the possession of the insolvents, precisely as before, up to the time of their insolvency. All that the petitioner in his evidence states with regard to possession is, that he went over the effects, and verified their existence.

The general question was raised, and much discussed in the Courts below, whether delivery or déplacement of the thing sold was necessary to pass the property in it. It was contended that the Canadian law which required déplacement had been altered in this respect by the Canadian Civil Code, as the French law had been by the Code Napoléon.

Art. 1472 of the Canadian Code is as follows:—

"Sale is a contract by which one party gives a thing to another for a price in money, which the latter obliges himself to pay for it. It is perfected by the consent alone of the parties, although the thing sold be not then delivered, subject nevertheless to the provisions contained in Article 1027."

Art. 1025 was also referred to.

Art. 1027 is as follows:—

"The rules contained in the two last preceding Articles apply as well to third persons as to the contracting parties, subject, in contracts for the transfer of immoveable property, to the special conditions contained in the Code for the registration of titles to and claims upon such property. But if a party oblige himself successively to two persons to deliver to each of them a thing which is purely moveable property, that one of the two who has been put in actual possession is preferred, and remains owner of the things, although his title be posterior in date; provided, however, that his possession be in good faith."

The question was debated in the Courts below whether, under the law established by these Articles, déplacement or a change of possession was not still necessary to give the petitioner a title against the assignee in insolvency. Their Lordships, however, do not feel it necessary to determine this question, because, allowing the appellant's construction of these Articles to the fullest extent, and assuming for the purpose of the present decision that, upon a genuine contract of sale, the property sold would pass to the vendee, as regards not only the vendor, but third persons, without delivery or déplacement, they agree

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...the opinion of Chief Justice Dorion (in which Justices Cross and Tessier ...curred) that the transaction in question was not a genuine but a simulated ...le, and, if at all real, was a contrivance intended to obtain, under colour of a sale, a security upon the plant and effects, and thus to avoid the delivery of possession which is essential to the validity of a pledge. (See as to pledge Art. 1966–1970, Canadian Civil Code.)

In examining the character of the transaction, it is in the first place to be observed that the alleged sale was not for a price in money, but for something equivalent to money; nor was the consideration fixed and certain, but wholly indeterminate, the amount depending on future contingencies. The considerations expressed in the instrument are, (1) One dollar, which of course is merely a nominal, and not a serious part of the consideration; (2) "other good and valuable consideration heretofore had and received," the nature and amount being both unexpressed; and (3) what appears to be the real consideration, viz., that the vendee would endorse the paper of the firm, which he agrees to do ...for a sum which, together with present unsecured endorsements, should not exceed in all 2,000 dollars. This agreement of the appellant to give his endorsements by way of accommodation to the firm is obviously a consideration of an indeterminate character. Suppose he refused to give them, the remedy would be an action for breach of the agreement, in which the damages would be uncertain. Again, he does not bind himself to pay the bills he may endorse, and the holders might in the first instance choose to sue the firm. The ultimate extent of the liability on the agreement to indorse is plainly uncertain. This vague and contingent liability contains none of the elements of a fixed price, which is one of the essential incidents of the contract of sale. (*See* Pothier, Traité du Contrat de Vente, Part I., Sec. 2, Art. 2, secs. 1, 2, 3.)

But, however inconsistent the consideration expressed in the bill of sale may be with the idea of a sale, it would be fit and sufficient to support a contract of pledge for securing the appellant against loss arising from his endorsements of the paper of the firm; and that this, if it were at all real, was the nature and object of the transaction, is shown by other circumstances attending it. The value of some of the effects (for what reason does not appear) is stated in the deed, and this value alone amounts to $4,800. The rest is not valued, but obviously must have been of substantial value. It is scarcely to be supposed that all these effects would have been absolutely sold to the appellant for a contingent consideration which could not exceed $2,000.

Then, on the same day, the whole of the effects are leased to the insolvents for a yearly rent of $100. As the Chief Justice points out, this rent would return the supposed owner of the plant and stock 1½ or 2½ per cent. only upon their value, whilst these implements would come back to him at the end of the term deteriorated by wear and tear. Such a rent he considers to be illusory. Under colour of this lease the insolvents were able to retain the plant and carry on their business as usual.

If is to be ...ed that a transaction which ... on the face of the documents so abnormal a character has received ...extraneous support or

explanation. The appellant gave no evidence of any antecedent consideration, or of the extent of his endorsements of the paper of the firm, or of any circumstances to explain the alleged purchase.

It is scarcely necessary for their Lordships to say that, supposing (as they have assumed) the law to be that the property in the thing sold passes by a genuine contract of sale without delivery, even as against third persons, yet the circumstance of there being no change of possession must still be one of the material facts to be regarded in determining the question whether any particular sale is real or simulated.

In the present case their Lordships, for the reasons they have stated, agree with the majority of the Judges of the Court of Queen's Bench in their conclusion that, whatever may be the real nature of the transaction in question, it has not the indicia of a *bonâ fide* sale.

They will, therefore, humbly advise Her Majesty to affirm the judgment appealed from, and with costs.

Judgment of Court of Q. B. confirmed.

(S. B.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 16TH SEPTEMBER, 1879.

Coram HON. SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J.

No. 95.

THE MONTREAL COTTON CO.,

APPELLANT;

AND

THE CORPORATION OF THE TOWN SALABERRY OF VALLEYFIELD,

RESPONDENT.

HELD:—That a security bond in appeal from the Circuit Court may be amended by supplying the description of the real estate on which the security justified, and which had been omitted in the bond.

This was a motion to reject the appeal (being one from the Circuit Court) on the ground, amongst other things, that the surety who claimed to qualify on real estate had not described such real estate. And the appellant, thereupon, asked leave to supply the omission and to amend the bond accordingly.

The following was the order granted on the motion:—

"The Court * * * Inasmuch as it appears that the security bond filed in this case by the appellant is imperfect, there being no designation of the real estate on which the security qualifies, and inasmuch as the appellant offers to perfect and complete the said bond, grants the appellant six days to amend the said security bond, and reserves its decision as to the main motion, except as to costs of said motion, which the said appellant is condemned to pay and satisfy to said respondent."

Appellant allowed to amend bond.

J. K. Elliot, for respondent.

Davidson, Monk & Cross, for appellant.

(S. B.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 17TH DECEMBER, 1879.

Coram HON. SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 1001.

Carter, appellant, and *Lalanne*, respondent.

HELD:—That where the security on an appeal from the Circuit Court has not been put in within the delay required by Art. 1143 of the Code of C. P., the appeal must be dismissed.

Sir A. A. DORION, CH. J.—This is a motion by the respondent to dismiss the appeal on the ground that the security was not put in within the delay required by Art. 1143 of the Code of C. P.; the appeal being from a judgment of the Circuit Court. And the appellant also moves to be allowed to give any security that the Court may order.

We have held, that where imperfect security has been put in within the required delay, the Court, in its discretion, may allow the appellant to perfect the security. But it is impossible for the Court, where no security at all has been put in within said delay, to come to the relief of the appellant.

The appellant's motion, therefore, is granted, and that of the respondent rejected. Motion to dismiss appeal granted.

R. & L. Laflamme, for appellant.

Lacoste & Globensky, for respondent.

(S.B.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 17TH DECEMBER, 1879.

Coram HON. SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 160.

FONTAINE, APPELLANT;

AND

THE MONTREAL LOAN & MORTGAGE COMPANY, RESPONDENT.

HELD:—That when a defendant neglects to file the original plea of which a copy has been served on the opposite party, and the case proceeds to final hearing, as in a contested case, the plaintiff's attorney may file the copy of plea served on him, and stamp it, to take the place of the original plea, without notice to the defendant's attorney or leave or permission of the Court.

MONK, J., *dissentiens*.—The question involved in the present appeal is one of procedure, and although, as a general rule, I should feel indisposed to disturb a judgment on a mere technical point of practice, I consider the irregularity here complained of to be sufficiently grave to compel me to dissent from the judgment which the majority of the Court is about to render. It would appear, that the parties proceeded in the case as if a plea had been filed; no plea having, in reality, ever been filed. And the plaintiff's attorney having discovered the defect attempted to cure it by filing, *de plano* and without notice to the opposite party or leave or permission of the Court, a copy of plea which

had been previously served on him by the defendant's attorney; stamping the same with the amount payable on an original plea. According to my view, this could not be legally done, and I should be of opinion consequently to reverse the judgment as having been irregularly rendered under the circumstances.

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Sir A. A. Dorion, Ch. J.—No doubt there has been a great irregularity, but it was solely attributable to the fault of the appellant's attorney, who chose to serve a copy of plea on his adversary and not file the original. Besides he knew that the case was going on as if a plea had been filed, and he never objected to the case so proceeding. The only proceeding of which he had no notice was the filing of the copy of the plea; a procedure necessitated by his own neglect. We do not see how the filing of this copy of plea in any way injured the appellant, or how he can legally complain of that act. The judgment must, therefore, be confirmed.

Judgment of S. C. confirmed.

C. S. Burroughs, for appellant.
G. B. Cramp, for respondent.
(S.B.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 17th DECEMBER, 1879.

Coram Hon. Sir A. A. Dorion, Ch. J., Monk, J., Ramsay, J., Tessier, J., Cross, J.

No. 114.

HART et al., APPELLANTS;

AND

HART, RESPONDENT.

HELD:—That where the account asked for by an action *en reddition de compte* is filed in the case, and the plaintiffs neglect to contest it within fifteen days thereafter, the plaintiffs are held to have admitted the correctness of such account.

Tessier, J.—The action was brought by the appellants, *en reddition de compte*, for an account of the respondent's administration of Mrs. Hart's estate. The respondent produced an account, and notified the appellants to file any contestation which they might have to make to the account produced, within delay stated. No contestation was made, and appellants were foreclosed from contesting. We therefore hold that Articles 527 and 530 of the Code of Procedure are decisive of the case. The former requires parties accounted to to take communication of the account, and to file their contestation, if they contest it, within fifteen days, and Art. 530 says that, in default of filing contestations, the party bound to file them is held to admit the account produced. The appellants had an opportunity of contesting, but have not done so. The judgment appealed from is consequently, confirmed with costs.

Judgment of S. C. confirmed.

A. M. Hart, for appellants.
Coursol, Girouard & Wurtele, for respondent.
(S.B.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 4TH FEBRUARY, 1880.

Coram SIR A. A. DORION, C.J., MONK, J., RAMSAY, J., CROSS, J.

No. 71.

DANIEL McCLANAGHAN,

(Petitioner in the Court below,)

APPELLANT;

AND

THE ST. ANN'S MUTUAL BUILDING SOCIETY ET AL.,

(Defendants in the Court below,)

RESPONDENTS.

HELD:—1. An Act assuming to provide for the liquidation of Building Societies generally in the Province of Quebec, (whether insolvent or not) is *ultra vires* of the Parliament of Canada.

2. The adjudication as to costs is entirely in the discretion of the Court, except in such cases as are specially provided for by Statute.

3. The Court of Queen's Bench sitting in appeal will not, as a general rule, interfere with the award of costs by the inferior Court, and where a judgment is confirmed as to the *dispositif*, the appellant may be condemned to pay costs on the appeal though the judgment appealed from was based on erroneous grounds.

The judgment appealed from was rendered by the Superior Court, Montreal, in Chambers (TORRANCE, J.), 1st Dec., 1879. The learned Judge observed:

"This was a petition for a writ of injunction. The petitioner set forth that he was a member of the Building Society, incorporated under the Consolidated Statutes of Lower Canada, chap. 69, and under rule 8 of the Society he was proprietor of an appropriation of $2,000, and had conformed to the requirements of rules 9 and 10, which authorise the proprietor of an appropriation to furnish security on real estate of sufficient value to obtain the amount of the appropriation. That the security had been judged sufficient according to the rules, but the Society had refused to deliver the amount. Moreover, the Society had gone into liquidation, under the pretended authority of the Federal Act, 42 Victoria, chapter 43 (15th May, 1879). That a dividend was now (26th August, 1879) to be distributed to the shareholders, portion of which comes out of the appropriation in question; that the Act in question by the Federal Legislature was unconstitutional, and the liquidation at any rate could not take place in prejudice of the rights of petitioner. An injunction was, therefore, asked for against the Society, liquidators and Secretary-Treasurer, prohibiting them from distributing the funds, and adjudging that they had no power to proceed to said liquidation, and prohibiting the said corporation from doing so.

"The defendants pleaded that one W. E. Doran was a member of the Society, and on 22nd June, 1878, was allotted by ballot an appropriation of $2,000, which he transferred to petitioner on the 22nd April, 1879, who then became a member of the Society, bound to conform to its rules. That the subject of liquidation had been for a considerable time, before 22nd April, 1879, before the shareholders, and it was a matter of public notoriety that they would go into liquidation, and the said Federal Act was so passed to enable building

societies to do so. That the property offered as security by petitioner was not sufficient for the purpose, and the Directors, in the exercise of the discretion conferred upon them by the by-laws, declined to make the advance in question, and by letter of 9th May informed petitioner that his application could not be entertained without additional security; that at the annual general meeting, 14th May, a resolution was passed instructing the Directors to loan no further amounts pending a settlement of the Society's affairs, to wit, by liquidation under said Act; that petitioner did not offer the additional security, and on 16th June the Society went into liquidation. Petitioner answered that the Directors had never regularly refused the guarantee, but had refused the advance in order to go into liquidation; that they had asked the additional guarantee, which was at once given. That the assembly of 14th May had not power to order the liquidation. That the Federal Act was only passed subsequently.

"Two questions present themselves. 1. The sufficiency of the security and the exercise of discretion by the Directors of the Society. 2. The validity of the Act of the Federal Legislature, 42 Vic., cap. 48. The property owned and offered by the petitioner as security was valued by the City Corporation at $2,000, and by Mr. Hopkins and Mr. Brown at $3,500. On the other hand, Mr. Tuhey, the valuator of the Trust and Loan Company, says the security would not be good for $2,000, and his company would not lend money on it at all as being unproductive. The other property under discussion, though not formally offered or examined, was valued by the Corporation at $500. Mr. Hynes, the owner, paid $700 for it, and it was mortgaged for $300. Mr. Hynes intended to remove the mortgage, but cannot say that he informed the officers of the defendants of this intention. In respect to the exercise of discretion by the directors in accepting a security, I would refer to the evidence of Daniel [illegible]. Against his reasons for refusal I am unable to say a word. I would also call attention to the bill before the Quebec Legislature to define the investments to be made by administrators and trustees. By this bill they are not allowed to lend money on a security less than double the amount to be loaned, and the value is taken from the valuation roll of the municipality. It is to be remarked that the value of the two properties in question is only $2,500 according to the Corporation roll. Mr. Phelan also says that they would have a greater claim against the borrower than the $2,000 advanced, namely, for fines. My conclusion is, therefore, that the security offered was wisely refused. It may be unnecessary to pronounce upon the validity of the Federal Act (15th May 1879), 42 Vic., cap. 48, but it appears to me that a legislature which has power in matters of bankruptcy and insolvency and savings banks, may reasonably claim power to legislate for the liquidation of this Society, for the reasons mentioned in the preamble to the Act. Petition dismissed."

Sir A. A. Dorion, C. J. This appeal is from a judgment dissolving an injunction which the appellant obtained against the Society, respondent.

The appellant complains that having purchased an appropriation of $2,000, awarded by the Society, he applied for the money and offered security as re-

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quired by the by-laws of the Association; that the security was declared insufficient, and that he tendered additional and adequate security; that without adjudicating upon the new securities offered, the Society entered into liquidation under the Dominion statute 42 Vict. c. 48, and was about to declare a dividend which would include the $2,000 which he was entitled to for his appropriation; that this statute was *ultra vires*, and the Society had no right to go into liquidation under its provisions. Wherefore he applied for a writ of injunction, which was issued on the 26th of August, 1879, restraining the Society and its officers from declaring a dividend, and from proceeding to the liquidation of the affairs of the Society.

The Superior Court maintained the defence set up by the Society, and held that the Board of Directors, in the proper exercise of their discretion, were justified in rejecting the security offered by the appellant, as insufficient, and that the proceedings in liquidation were well taken under the Dominion Act, which was not *ultra vires*.

While these proceedings were pending in the Court below, the Local Legislature of the Province of Quebec passed a statute re-enacting, as to the Province of Quebec, all the provisions of the Dominion Act, and also another statute ratifying all the proceedings adopted under its provisions. The last Act was not, however, to affect pending cases. These two statutes, 43 Vict. ch. 32 and ch. 33, were sanctioned on the 31st of October, 1879.

The judgment has been rendered and the appeal taken since the passing of these two statutes, and since the proceedings of the Society to wind up their affairs have been ratified by the Quebec Legislature.

We cannot agree with the Court below, that the Dominion Parliament had the right to pass the Act 42 Vic. c. 48. This Act is not in the nature of an insolvency law, for it is intended to apply to all building societies, whether solvent or not. It is therefore essentially an Act affecting civil rights, which, under the provision of the British North American Act, 1867, comes within the exclusive jurisdiction of the Local or Provincial Legislatures.

The case of *L'Union St. Jacques & Belisle* (20 L. C. J. 29) is in point.

In that case the Lords of the Privy Council decided that a law authorising a benevolent association, in financial difficulties, to compel parties to accept a fixed indemnity in lieu of the annuities to which they were entitled under the rules of the Society, was within the legislative powers of the Legislature of the Province of Quebec, as affecting civil rights only.

We cannot, therefore, consider the proceedings in liquidation adopted by the Society as legal. But, these proceedings having been rendered valid by the Quebec Legislature, there is now no ground to restrain the Society from proceeding to the liquidation of their affairs, and there was none when the judgment of the Court below was rendered and when this appeal was instituted. The judgment dissolving the injunction must, therefore, be confirmed.

The only thing that the appellant might expect would be a reversal of the judgment as to costs.

In this country the awarding of costs has always been considered as within the discretion of the Courts.

The Ordinance of 1667, Tit. 31, art. 1, was in these terms: "Toute partie "soit principale, soit intervenante, qui succombera même aux renvois, déclina- "toires, évocations ou réglements de juges, sera condamnée aux dépens indéfini- "ment, nonobstant la proximité ou autres qualités des parties; sans que sous "prétexte d'équité, partage d'avis, ou pour quelqu'autre cause que ce soit, elle "en puisse être déchargée," &c.

This article was only registered at the Conseil Supérieur de Québec subject to the following modification:

"Sur le dit titre, que parce qu'en ce pays, il est difficile d'être bien conduit "dans les affaires par de bons avis, ce qui cause souvent qu'on s'engage à plai- "der mal à propos, le Conseil sous le bon plaisir du Roi, se réserve la faculté "de prononcer sur les dépens avec même déliberation et selon l'exigence des "cas, sans s'arrêter à présent, à tout ce qui est dit dans le dit titre, qui regarde "plus les procureurs et avocats qui ne sont point établis dans ce pays que les "parties," &c.

It has always been held by the French Parliaments that the Ordinances of the Kings of France had no force of law until they were registered in their respective jurisdictions.

The Conseil Supérieur of Quebec exercised here the same authority as regards the registration of Ordinances emanating from the King as the *parlements* did in France. Hence it is that the great Ordinances concerning donations, substitutions, wills, the Ordinance de la Marine, and many others which have not been registered at the Conseil Supérieur, have never been considered to be law in this Province. With regard to the Ordinance of 1667 it has only been in force here, as modified by the representations which the Conseil Supérieur made when ordering its registration, and the particular article now under consideration has always been held to leave the adjudication of costs in this country entirely at the discretion of the Courts, unless otherwise provided for by statutory enactment, as was done by the 25th Geo. 3, C. 2, S. 4, with regard to costs in actions for personal wrongs.

The Code of Civil Procedure, Art. 478, admits this discretion:

"The losing party must pay all costs, unless for special reasons the Court "thinks proper to reduce them, or compensate them, or orders otherwise."

It is therefore difficult to say that a judgment refusing costs, or condemning a party to pay costs, is wrong, when so much discretion is left to the judges in matters of costs, and it is seldom that a court of appeal will feel disposed to reverse a judgment simply because the appellant was refused costs in the Court below, whether he was there successful or not.

We do not think that in this case the appellant is deserving of any particular favour. He began his proceedings after the Society had by an almost unanimous vote of its members resolved to wind up its affairs, which were no longer profitable. This was after the passing of the Dominion Act, and while a bill was before the Local Legislature to enact for this Province the same provisions as those of the Dominion Act.

The main objection of the appellant to the winding up of the affairs of

McClanaghan and The St. Ann's Mutual Building Society.

the Society was that he was entitled to an appropriation of $2,000, of which he would be deprived by the liquidation of the affairs of the Society and payment of dividends, and it was to compel the Society to pay him this appropriation that he asked for an injunction to restrain the Company from paying a dividend and from proceeding to liquidation.

The appellant failed on this first and most important of his contentions. This Court agrees with the Court below that the appellant's offer of security was properly rejected, and that, not having fulfilled the conditions required to obtain the loan before the proceedings in liquidation were begun, he is not entitled to do so now.

The demand for an injunction was as it were subsidiary to the appellant's claim that he was entitled to the $2,000. After their proceedings had been ratified by the Quebec Legislature, the appellant did not restrict his demand to the costs he had incurred, but pressed his other claims, on which he failed.

The Society proceeded in good faith to wind up its affairs under the Dominion Act. The appellant must have known that legislation was going on in Quebec to supplement the Dominion legislation, and we do not think that this is such a favorable case that we ought to mulct the respondent in the heavy costs incurred in both courts, when the appellant, while insisting upon his extreme demand, is declared unfounded in the most important portion of it.

The judgment is confirmed with costs against the appellant.

RAMSAY, J. I concur in the judgment in so far as it reverses the decision of the Court below as to the constitutionality of the Dominion Act. But I differ as to the question of costs. The appellant came here with the law in his favor, and I cannot, therefore, concur in that part of the judgment which condemns him to pay the costs of the appeal.

The judgment is as follows:—

"The Court, &c.

"Considering that the security offered by the appellant, petitioner in the Court below, for the appropriation of $2,000 was rightly rejected by the Directors of said respondents, defendants in the Court below, in the exercise of their discretion under the by-laws of the said Society;

"And considering that in the *dispositif* of the judgment appealed from, to wit, the judgment rendered by the Superior Court for Lower Canada sitting in Chambers, at Montreal, in the District of Montreal, on the 1st day of December, 1879, there is no error, doth affirm the same with costs to the respondents against the said appellant. (Mr. Justice Ramsay dissenting as to costs.)"

Lacoste & Globensky, for appellant.

Doutre, Joseph & McCord, for respondents.

(J. K.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 17TH DECEMBER, 1879.

Coram Sir A. A. DORION, C. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 188.

MARTHA PIERCE ET AL.,

(Defendants in the Court below,)

APPELLANTS;

AND

JULIA BUTTERS ET AL.,

(Plaintiffs in the Court below,)

RESPONDENTS.

HELD:—1. (Following *Rolland & Beaudry*, 23 L. C. J. 255). Universal legatees, who accept a succession purely and simply, may be sued for a debt of the testator, notwithstanding that the testator may have named executors in whose hands the estate still is at the time the action is instituted.

2. The nullity pronounced by Art. 311 C. C., with regard to a settlement between a minor become of age and his tutor, relating to the administration, is only a relative nullity, and must be invoked by the pupil, who cannot bring an action to account, *de plano*, against the tutor, without asking to be relieved from the discharge given upon the first account rendered by the tutor.

Sir A. A. DORION, C. J.—This is an action by Julia Ellen Butters, the female respondent, against the appellants, who are the representatives of her late father, Isaac Butters, for an account of the estate of her late mother, and of his administration thereof as her tutor.

Isaac Butters was married in June, 1848, to Martha Ellen Kellaur, who died intestate in 1851, leaving two children. One of these children died shortly after its mother. The other, Julia Ellen Butters, is the plaintiff and respondent in this cause, and the only representative of her mother.

In 1853, Mr. Butters was married to Hellen A. Bulloch, who died in 1858, leaving a child, Charles E. Butters, one of the appellants.

In March, 1855, Mr. Butters was appointed tutor to the respondent, and on the same day he caused an inventory to be made.

Subsequently, Mr. Butters married Martha Pierce, with whom he had three children. He died in 1875.

The action is against Martha Pierce as tutrix to her three children, and Charles E. Butters as representing the late Isaac Butters.

These defendants, now appellants, have pleaded that in 1877 the late Isaac Butters had rendered an account of his administration and paid to the respondent a sum of $12,500, as and for balance of account, and had obtained a full discharge on the 15th of April, 1870, from the respondents' attorney, which discharge she ratified on the 5th of May, 1870. They also allege that the estate is still in the hands of the executors, and that the action to account should have been brought against them.

This last portion of the appellants' plea cannot be maintained. The action is well brought against the heirs at law or universal legatees, who are the parties

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bound to pay the debts, and therefore really interested in the settlement of the liabilities of the estate, as we have already decided in the case of Rolland et al. & Beaudry (C. C. Art. 735). The executors can only pay the debts with the consent of the heirs or legatees (C. C. Art. 919).

The only other questions in this case are: 1st. Could the plaintiff demand an account without asking to set aside and be relieved from the discharge she has given, and by which she has acknowledged that an account has already been rendered to her?

2nd. Is it proved that there was no account, and that the mention of it in the discharge is a mere subterfuge to avoid the law prohibiting a transaction between a tutor and his pupil before an account has been rendered and vouchers produced?

On the first question I am of opinion that the nullity pronounced by Art. 311 is what is termed a *nullité relative*, which the pupil alone can invoke, and which must therefore be claimed by him. The discharge in this case, supposing the facts alleged to be true, is not absolutely void but is only voidable, and on that account the action should have been to set it aside and to ask for an account. This is well explained by Pothier, Traité des Personnes, No. 189, where he says: . . . "toute transaction, tout contrat passé entre le tuteur "et le mineur devenu majeur, avant que ce compte ait été rendu *n'oblige point* "*le mineur qui peut s'en faire relever et les faire déclarer nuls*; quoiqu'il ait "passé ces actes en majorité."

The minor can ask to be relieved from such a transaction, he can ask to have it set aside, says Pothier. From this it follows that he cannot *de plano* ask another account while the transaction by which he has discharged his tutor still subsists.

Demolombe, vol. 2, de la Minorité, No. 90, § 2, is still more explicit than Pothier. "De ces motifs de l'art. 472, (corresponding to art. 311 of our Code) "il résulte que le traité passé entre le tuteur et le mineur devenu majeur, sans "l'observation des conditions qu'il prescrit, que ce traité, disons-nous, n'est pas "nul de plein droit, (art. 1117) et qu'il est seulement annulable."

"Il est vrai que l'art. 472 déclare que le traité sera nul. Mais nous avons "déjà remarqué que la terminologie des articles du Code Napoléon était loin, "précisément surtout en cette matière, d'être irréprochable; et il n'est pas dou- "teux qu'il faut appliquer à ce traité la même doctrine que la loi applique à tous "les contrats qui pèchent soit pour cause de quelque vice de consentement, dol, "erreur ou violence (arts. 115, 117), soit pour cause d'incapacité de l'une ou de "l'autre des parties, minorité, interdiction, etc., (art. 225, 1125; comp. aussi "art. 502).

"C'est-à-dire que ce traité existe, que la convention s'est formée juridiquement; "mais que la nullité, ou plutôt l'annulation, peut en être demandée en justice."

Idem, No. 91.

1o. "La nullité de la convention est seulement relative et proposable par celle "des parties dans l'intérêt de laquelle la cause de cette nullité existe. (Art. 1125)."

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At p. 137, No. 167, the author says, that the minor who after becoming of age has made such a transaction has ten years from its date to demand its cancellation; and that he may at the same time ask for a new account.

Demolombe also says at No. 97 that in case the transaction is annulled the ex-minor is bound to return what he may have received under it. His expressions are: "Quoiqu'il en soit, aucune présomption semblable existe dans le Code Napoléon; et nous pensons que l'ex-mineur devrait, d'après le droit commun, restituer ce qu'il aurait reçu du fraité, dont il aurait demandé la nullité."

It would, however, seem reasonable that the ward should not be bound to reimburse the sums received until the rendering of the second account, for there is a strong presumption that the amount paid was really due. But he should at least offer to impute the amount received on the sums for which he claims a condemnation against his tutor.

In the present case the respondent has neither asked that the discharge she gave be set aside, nor offered to return the sum of $12,500 which she has received, nor has she offered to deduct the same from the amount she may be entitled to.

We have already decided in the case of Riendeau v. Degroseillers (22nd June, 1877), that the plaintiff who had accepted an account and approved of it while she was only emancipated by marriage, was obliged to ask to be released before she could obtain an order against her late tutor to render her another account of his tutorship.

This decision applies to this cause, and is fully supported by the numerous authorities cited in the case of Moreau v. Moiz, 7 L. C. R. 147.

The Court holding that the action was irregularly brought, and that the objection of the appellant is fatal, it is unnecessary to examine the question whether or not there is evidence in the case that no proper account was rendered when the respondent gave her discharge.

The judgment is reversed and the action dismissed.

The judgment is as follows:—

"Considering that the female respondent has by her attorney, by act of the 15th day of April, 1870, passed before C. A. Richardson, notary, acknowledged that her late father, Isaac Butters, had rendered her a true and faithful account of his administration, which he had as tutor to the said female respondent, of the property of the said female respondent; and had paid unto her the sum of $12,500 as the balance or residue of said account, for which through her said attorney she gave the said Isaac Butters a full and complete discharge,—which act was subsequently, to wit, on the 5th of May, 1870, duly ratified by the said female respondent;

"And considering that the said female respondent cannot claim another account from the representatives of the said late Isaac Butters for his administration as tutor of her property, without first demanding that the said discharge so given by her said attorney, and ratified by her as aforesaid, be set aside and declared null and void;

"And considering that the female respondent has instituted the present action

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without having first demanded the resiliation of the said discharge of the 15th of April, 1870, and of the said ratification of the 5th day of May, 1870;

"And considering that there is error in the judgment rendered by the Superior Court sitting at Sherbrooke on the 2nd day of July, 1878;

"This Court doth cancel and annul the said judgment of the 2nd July, 1878; And proceeding to render the judgment which the said Superior Court should have rendered, doth dismiss the action of the said respondent, and doth condemn her to pay to appellant the costs incurred as well in the Court below as on the present appeal."

Judgment of S. C. reversed.

Hall, White & Panneton, for appellants.

Ives, Brown & Merry, for respondents.

(J.K.)

The judgment in the case cited above, *Des Groseillers & Riendeau* (22 June, 1877, Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.), was as follows:—

"La Cour, etc...

"Considérant que le défendeur, appelant, en sa qualité de tuteur de la demanderesse, intimée, a, dès longtemps avant l'institution de l'action en cette cause, rendu à sa dite pupille alors émancipée par mariage, et assistée d'un curateur légalement élu à cette charge, compte de son administration des biens de la dite demanderesse, intimée, ainsi qu'il appert par le compte rendu du 23 mars 1870, devant Mtre. A. R. Bisson, notaire, et ce jusqu'à la date du dit compte, et conséquemment que le dit défendeur, appelant, ne peut être contraint de rendre un nouveau compte à la demanderesse intimée, sauf à cette dernière à débattre le dit compte si elle le juge à propos par action directe;

"Considérant qu'il n'y apparait pas que le défendeur ait continué la dite administration après la date du dit compte;

"Considérant de plus que la demanderesse, intimée, ne pouvait demander au défendeur, appelant, une reddition de compte sans en même temps demander à ce que le compte déjà rendu par le dit défendeur, appelant, et accepté par la demanderesse, intimée, assistée de son curateur, fût mis de côté, et qu'elle fut relevée de son acceptation;

"Considérant que dans le jugement rendu par la Cour Supérieure en révision à Montréal le 30ème jour de septembre 1876, il y a erreur;

"Casse et annule et met à néant le dit jugement, et procédant à rendre le jugement que la dite Cour Supérieure siégeant en révision aurait dû rendre, confirme le jugement rendu par la Cour Supérieure à Beauharnois le 10ème jour de janvier 1876, et condamne les intimés à payer à l'appelant les frais en Cour de Révision et en Cour d'Appel."

(J.K.)

COUR DU BANC DE LA REINE, 1875.

(EN APPEL)

MONTRÉAL, 21 JUIN 1875.

Coram MONK, J., TASCHEREAU, J., RAMSAY, J., SANBORN, J., SICOTTE, J., (*ad hoc*).

No. 132.

DAME ANATHALIE TRUDELLE,

(*Opposante en Cour Inférieure*),

APPELANTE;

vs.

EPHREM HUDON ET AL.,

(*Contestants en Cour Inférieure*),

INTIMÉS.

JUGE:—1. Qu'une partie condamnée comme légataire universelle ou donataire universelle en usufruit est en vertu de tel jugement débitrice personnelle du jugement.

2. Que la désignation d'un des défendeurs dans le bref d'exécution comme légataire universelle en usufruit, au lieu de donataire universelle en usufruit que comporte le jugement, n'entraîne pas la nullité de la saisie, et justifie la saisie des biens personnels de tel défendeur.

Les Intimés, Ephrem Hudon et al., ont obtenu un jugement, le 30 mai 1866, confirmé en appel, condamnant les défendeurs Charles F. Painchaud et Eucher B. Dufort, en leur qualité de légataires fidéi-commissaires de feu David Laurent, et Dame Anathalie Trudelle sa veuve, en qualité d'usufruitière universelle de son mari, à payer aux demandeurs $5,159.48 avec intérêts et dépens.

Un bref d'exécution *de bonis*, en langue anglaise, a été émis contre tous les défendeurs. Dans ce bref elle est désignée comme veuve de feu David Laurent, *in her quality of universal usufructuary legatee of her late husband.*

Les Intimés ont saisi quarante actions du capital de la banque Jacques Cartier de $50 chacune que l'appelante avait en son propre nom. Elle s'est opposée à la saisie de ces actions qu'elle réclame comme sa propriété personnelle, les ayant payées de ses propres deniers, depuis la mort de son mari.

L'appelante allègue qu'elle n'a pas été condamnée comme légataire, mais bien comme usufruitière, par son contrat de mariage, et que comme telle elle n'est point tenue de payer à même ses biens personnels les dettes de son mari; que tout ce que peuvent exiger les créanciers de la succession, c'est un compte des biens qu'elle pourrait avoir reçus, en usufruit, sauf à faire valoir, sur ce débat de compte, les droits qu'elle même peut avoir contre cette succession.

Les Intimés allèguent par leur contestation de l'opposition:

Que le jugement rendu en cette cause est rendu contre l'appelante qui devient débitrice du montant du jugement; qu'en sa qualité de légataire ou donataire universelle en usufruit elle est devenue débitrice personnelle des demandeurs; qu'elle n'a jamais renoncé au legs, et qu'au contraire elle a fait des actes impliquant acceptation; qu'elle a continué le commerce existant entre son mari et Auguste Laforce; en a perçu les profits, et que le six novembre 1863, elle a vendu à Laforce tout l'intérêt de la succession dans la société pour $6,000 qu'elle a perçu, qu'elle a gardé tous les biens composant la succession en sa qualité de légataire ou donataire universelle, qui s'élevaient à $16,000 outre les meubles et immeubles, et qu'elle a disposé du tout, que le 23 septembre 1862

Tradelle et Rudon, et al.

les défendeurs lui ont remis tous les biens en leur qualité d'exécuteurs testamentaires, desquels elle a disposé, et a réalisé $80,000; qu'après avoir fait acte d'acceptation et après aliénation de ces biens et de plus, après la condamnation portée dans le jugement comme légataire ou donataire universelle, sans qu'elle ait excipé de cette qualité, elle ne peut s'exonérer de la responsabilité résultant de tel jugement; que la condamnation en vertu du jugement définitif en sa qualité de légataire ou donataire universelle en usufruit devient par le fait du jugement une condamnation personnelle sans aucune exception, exemption ou condition; que la prétendue renonciation, n'ayant jamais été invoquée dans l'action, ne peut l'être par opposition; que telle renonciation est nulle, ayant été faite après acceptation du legs universel en usufruit, après avoir pris et absorbé toute la succession, après avoir aliéné les meubles, actions, et réalisé à son profit les biens de la succession; de plus telle renonciation est frauduleuse; qu'en outre l'appelante ne pouvait s'exonérer que par la production d'un compte, établissant que tous les biens de la succession ont été absorbés pour l'acquittement des dettes; qu'il appert par l'inventaire que les actions de banques et de la compagnie du Richelieu appartenaient à David Laurent, et que l'appelante ayant en sa possession tous les biens de la succession, y compris ses parts ou actions, a, par dol et fraude, substitué les dites actions originairement au nom de la succession, et les a placées en son nom personnel, et en a acquis à même les deniers de la succession; que l'appelante ne peut alléguer ses prétendues réclamations contre la succession de son mari pour justifier ses prétentions de s'emparer de ces biens, que par le fait de l'acceptation du legs universel, et comme usufruitière des biens de la succession dont elle a pris possession en vertu du jugement qui la condamne en sa qualité d'usufruitière à en payer le montant, il s'est opéré une confusion de ses créances contre son mari, et elle ne peut les invoquer à l'encontre des demandeurs, ses créanciers personnels, en vertu du dit jugement; que les avantages et notamment *l'usufruit à elle accordé par son contrat*, ne peut s'exercer que sur les biens de la succession, qui existeraient après que les créanciers seraient payés, que l'appelante n'avait aucuns biens ou deniers avant son mariage, à l'aide desquels elle ait pu faire l'acquisition des actions de banques, etc., qu'elle a aujourd'hui en sa possession des biens au montant de $50,000 appartenant à la succession.

Les demandeurs demandaient en outre la nullité de la renonciation.

Le 30 juin 1873, la Cour Supérieure (Mackay, J.,) rendit le jugement suivant:

"The Court having heard the opposant and contestants by their Counsel upon the merits of the opposition made and filed by said opposant in this cause and the contestation thereof by plaintiffs, having examined the proceedings, proofs of record and evidence adduced and maturely deliberated;

"Considering opposant's opposition unfounded, save only in its allegation of part payment $330 having been made by opposant for which the writ of execution does not credit her; yet ought to;

"Considering the contestation of opposant's opposition well founded; save in so far as regards the claim of opposant founded upon the partial payment of $330 made by her as alleged;

"Considering that opposant went too far in asking the setting aside totally of the *saisie-exécution*;

"Considering as to the quality in which the said opposant has been condemned, that the writ of execution must control as to that, in the absence of *inscriptions de faux* against it and its enunciations: Doth maintain the said contestation of opposition, save as aforesaid, and declare the said opposition unfounded, save that upon it the amount for which execution shall proceed shall be reduced by said $330 and proportionate interest,—each party to bear his and her own costs of opposition and contestation."

Le Juge Mackay a dit: This is a case which has given much trouble and been pending for 20 years, during which time it has gone even to the Privy Council. It appears that in the course of the proceedings the quality of the defendant has come to be changed. She comes in now by an opposition to the execution, and says she has paid part of the money; and she further alleges the error as to the quality in which she was condemned. The plaintiffs contest, and persist in saying that they have a right to execute her. The opposant is correct in the statement of her quality, but the writ of execution says that she was condemned in a certain quality, and I must take that to be the truth, there being no *inscription de faux* against the writ. I have to declare the execution perfectly good, save as regards the sum of $330, which the opposant has already paid. The execution must be reduced by that amount, and each party will have to pay their own costs.

L'opposante appelle de ce jugement et soumet les propositions suivantes:

1o. Le bref d'exécution n'étant pas conforme au jugement dans la cause, l'appelante avait-elle le droit de s'y opposer par la voie qu'elle a choisie, savoir l'opposition afin d'annuler?

2o. L'appelante a-t-elle prouvé que les parts de banque saisies sont sa propriété personnelle et qu'elle les a payées de ses propres deniers?

3o. L'appelante, comme usufruitière par son contrat de mariage, est-elle tenue, sur ses biens personnels, au paiement des dettes de la succession?

Les Intimés maintiennent que la saisie des biens personnels de la défenderesse est légalement faite, attendu que le jugement est rendu contre elle, en sa qualité d'usufruitière universelle, sans exception ou réserve, et sans qu'elle eût invoqué aucune renonciation ou produit un inventaire et sans avoir rendu compte des biens dont elle a pris possession appartenant à la succession, et sans offrir de les abandonner aux demandeurs-créanciers de la succession, elle reste débitrice personnelle du jugement.

Jugement en appel.

La Cour après avoir entendu les parties par leurs avocats sur le mérite, examiné le dossier de la procédure en Cour de première instance, les griefs d'appel et les réponses à iceux et sur le tout mûrement délibéré; Considérant qu'il n'y a pas mal jugé dans le jugement rendu par la Cour Supérieure siégeant à Montréal le 30ème jour de juin 1873, et dont est appel, confirme le dit jugement avec dépens contre l'appelante en faveur des dits intimés; *dissentiente* l'Hon. Juge SICOTTE, *ad hoc*.

Loranger & Loranger, pour l'appelante.

Laflamme, Huntington, Monk & Laflamme, pour les intimés.

(R. L.)

COUR DE CIRCUIT, 1880.

DISTRICT DE TERREBONNE, 14 JANVIER 1880.

Coram JOHNSON, J.

No. 177.

La Compagnie du Chemin de Fer des Laurentides vs. *Antoine Gauthier.*

JUGE:—Qu'un huissier de la Cour Supérieure nommé pour exercer dans un certain district où il réside, ne perd pas qualité pour exercer dans tel district, par le fait qu'ayant cessé d'y résider, il est nommé huissier pour un autre district dans lequel il vient résider.

2. Que le mot *immatriculé* mentionné dans l'art. 78 C. P. C. comme devant se trouver dans le rapport de signification que fait l'huissier, n'est pas sacramentel. Tout terme indiquant le district dans lequel il a qualité d'exercer, suffit.

Le bref et la déclaration en cette cause avaient été remis pour signification à W. Dumas qui avait été nommé huissier de la Cour Supérieure pour le district de Terrebonne, alors qu'il résidait dans ce district. Quelques années après, Dumas vint résider à Montréal et y fut nommé huissier de la Cour Supérieure.

Le défendeur produisit à l'encontre de l'action de la demanderesse une *exception à la forme* fondée sur la prétention que " Dumas a cessé d'être huissier " pour le district de Terrebonne et de pouvoir y exercer comme tel du moment " qu'il a été nommé huissier pour le district de Montréal, il y a au-delà de dix " ans, et y a fixé son domicile, la dernière nomination comportant de droit la " révocation de toute autre commission antérieure,—que Dumas ne peut exercer " comme huissier sous deux commissions différentes pour deux districts séparés " en même temps."

PER CURIAM. Je ne trouve rien dans la loi qui empêche un huissier d'instrumenter d'une manière légale dans tel district pour lequel il aurait été une fois admis, quoiqu'il aurait cessé d'y avoir son domicile, ce qui a précisément eu lieu dans les dix causes actuelles.

J'en viens donc à la conclusion que les exceptions à la forme, produites dans ces dix causes, sont mal fondées et qu'elles doivent être renvoyées avec dépens.

DeBellefeuille & Turgeon, avocats de la demanderesse.

Prevost & Préfontaine, avocats du défendeur.

(E. LEF. DE B.)

SUPERIOR COURT, 1879.

MONTREAL, 30TH SEPTEMBER, 1879.

Coram PAPINEAU, J.

No. 1245.

In re John Dwyer, insolvent, *Fabre*, assignee, and *McCarron*, contesting dividend sheet.

HELD:—The registration of a hypothecary claim within thirty days preceding the insolvency of the debtor is without effect. Such claim, however, should be collocated as an ordinary unprivileged claim.

PAPINEAU, J.:—Une feuille de dividende est préparée avec la note suivante: "The claim of Chs. McCarron on account of mortgage for $1,000 and inter-

Dwyer and McCarron.

est is not collocated, the said mortgage having been registered on 23rd December, 1876, being within the thirty days immediately preceding the insolvency."

McCarron conteste et allègue qu'il a produit sa réclamation chez le syndic, qu'il a prouvé sa réclamation et est créancier au montant de $939.59 avec privilége sur le produit de l'immeuble vendu, qu'il aurait du être colloqué pour toute cette somme avant les créanciers ordinaires, et que, dans tous les cas, il aurait dû être colloqué avec tous les autres créanciers, sa réclamation n'ayant pas été contestée.

Il demande que la feuille de dividende soit déclarée irrégulière, qu'il en soit préparé une autre le colloquant pour la somme de $939.59 suivant le rang de son obligation dont copie est produite avec sa réclamation.

Le syndic lui répond qu'il n'a jamais produit ni prouvé aucune réclamation.

Que l'acte d'obligation mentionné dans la contestation n'a été enregistré que le 23 décembre 1876, jour où le bref en liquidation compulsoire a émané.

Le contestant réplique qu'il avait une hypothèque en date du 14 novembre 1876 et dûment enregistrée, qu'il n'était pas obligé de produire de réclamation—que cependant il en produit une avec sa réplique dûment attestée et accompagnée de ses pièces justificatives.

Que son hypothèque a été régulièrement enregistrée, et que si l'enrégistrement a été retardé c'est par erreur du notaire qui s'était chargé de la faire enregistrer immédiatement.

Qu'il a payé de bonne foi la somme de $1,000 mentionnée dans son obligation.

Le syndic vient trop tard pour contester la réclamation, il aurait dû le faire dans le temps voulu par la loi.

Il est maintenant avéré que le contestant n'a pas produit sa réclamation chez le syndic, il ne l'a produite qu'avec sa réplique.

Il prétend qu'il n'était pas obligé de produire de réclamation parce que sa créance étant une créance hypothécaire devait paraître au certificat du bureau d'enrégistrement, et le syndic la connaissait puisqu'il en fait mention sur la feuille de dividende, mais sans la colloquer.

La section 77 de l'acte de faillite enjoint au syndic, aussitôt qu'il a fait la vente d'un immeuble, d'obtenir du régistrateur un certificat des hypothèques enregistrées jusqu'au jour de l'émanation du bref, et ce certificat doit être semblable à celui que le Code de Procédure ordonne au shérif de se procurer en cas de vente par décret, et les dispositions du Code de Procédure relative à la distribution des deniers et aux collocations des créances hypothécaires ou privilégiées devront être suivies autant que la nature des cas pourra le permettre.

L'art. 727 dit: "En préparant l'ordre de collocation ou de distribution, le "protonotaire doit le faire suivant les droits apparents des parties, tels que portés "au certificat des hypothèques produit par le shérif, aux oppositions, *réclama-* "*tions et autres pièces du dossier*, et aussi conformément aux règles contenues "dans le Code Civil au titre des priviléges et hypothèques, au titre de l'enrégis- "trement des droits réels, et à celles ci-après mentionnées."

L'art. 2090 du Code Civil dit: l'enregistrement d'un titre d'acquisition de droits réels dans ou sur les biens immobiliers d'une personne fait dans les trente jours qui précèdent sa faillite est sans effet, et 2091 il en est de même

Dwyer and McCarron

de l'enrégistrement effectué après la saisie de l'immeuble, lorsque cette saisie est suivie d'expropriation judiciaire.

Le syndic ne pouvait donc pas colloquer l'hypothèque du contestant. L'enregistrement de cette hypothèque étant sans effet aux yeux de la loi ne pouvait donc pas être pris en considération par le syndic en faisant sa feuille de dividende. Mais la créance du contestant ne devait pas être complètement mise de côté comme le syndic semble l'avoir fait.

La section 91 de l'acte de faillite de 1875, dit: "S'il appert au syndic, d'après l'examen des livres du failli *ou autrement*, que le failli a des créanciers qui n'ont pas pris les mesures nécessaires pour leur donner droit d'être colloqués, il sera de son devoir de réserver des dividendes pour ces créanciers suivant la nature de leurs réclamations et de les notifier de cette réserve..... et si ces créanciers ne produisent point leurs *créances* et ne *demandent* pas ces dividendes avant la déclaration du dernier dividende sur les biens, les dividendes réservés pour eux feront partie de ce dernier dividende.

Le syndic a eu connaissance de la créance du contestant puisqu'il la mentionne sur la feuille de dividende pour dire qu'elle n'est pas colloquée à raison de son enregistrement tardif. Cependant, il n'a rien réservé pour le contestant comme la loi lui enjoignait de le faire. Sa feuille de dividende est donc irrégulière et doit être réformée de manière à colloquer le contestant pour sa réclamation comme créance ordinaire et non privilégiée.

Les frais de contestation, à prendre sur la masse à partager.

Dividend sheet reformed.

Lunn & Davidson, for the assignee.

McMaster, Hall & Greenshields, for McCarron contesting dividend sheet.

(J.K.)

COURT OF REVIEW, 1880.

MONTREAL, 31ST MARCH, 1880.

Coram JOHNSON, J., TORRANCE, J., JETTE, J.

No. 2386.

Molsons Bank vs. *Lionais* es qual., & *La Société de Construction Mutuelle des Artisans*, Garnishee.

HELD:—That the attachment in the hands of a garnishee of a debt afterwards due to defendant by garnishee is not valid if at the moment of the seizure, the debt did not exist in favor of the defendant.

This was in review from a judgment of the Superior Court (RAINVILLE, J.), 19th September, 1879, maintaining the validity of a *saisie arrêt* in the hands of the garnishee. The case was by default as to the defendant, who was here the appellant. The service of the *saisie-arrêt* was on the 11th March, 1879, in the hands of the building society, garnishee, which declared on the 24th March, that at the time of the service it had not, had not now, and does not know that it will have in the future any moneys, moveables or effects belonging to the defendant, under the reserve of the following facts: That by obligation of

date 12th March, 1879; Joseph Galarneau sold to the garnishee land subject to the charge of paying on 7th December, 1880, or earlier, to the heirs and representatives of Dame Henriette Moreau, wife of the defendant, $200, and interest; that there had been no intervention or acceptation of this indication of payment on the part of said heirs, &c., but it was to the knowledge of said garnishee that said $200 had been transferred by the defendant to Joseph O. Joseph, advocate, by transfer of date 18th March, 1879, [illegible] to Galarneau on the 22nd March, 1879.

PER CURIAM. The simple question [illegible] service of the *saisie-arrêt* on the 11th March, 1879, could [illegible] debt which had no existence in favor of the defendant against [illegible] the 12th March. It is true that the demand by the writ [illegible] is required to declare not only what he did owe at the [illegible] but also what he should owe in the future, and this agrees [illegible] requirements of the C. C. P., 613, 619. C. P. 619 says: "The garnishee must declare in what he was indebted at the time of the service of the writ upon him, in what he has become indebted since that time," &c. These rules agree with the forms to be found in the French books.

Roger, *Saisie-arrêt*, Edition of 1860, p. 149, Art. 171 *bis*, remarks on the case now before the Court in these words: "Mais lorsque le tiers-saisi ne doit rien encore au débiteur, et qu'il ne vient à lui devoir que postérieurement à la saisie-arrêt formée entre ses mains, il faut considérer cette saisie comme prématurée et frappant dans le vide. Elle ne saurait produire d'effet, car elle n'a pu arrêter entre les mains du tiers-saisi des valeurs qui ne s'y trouvaient pas." Two *arrêts* are cited from Bioche, Journal de Procédure, Art. 6375 et Art. 3742.

We hold here with these *arrêts* that the attachment made on the 11th March did not touch the debt which only existed on the 12th March, and therefore that the *saisie* should be discharged. We notice, however, no transfer signified by Mr. Joseph upon the society garnishee, and it may be that a new attachment in the hands of the society might operate failing a previous signification by Joseph upon the society. So far the facts put before us show only a signification of the transfer in favor of Joseph on Galarneau, not on the Society.

The judgment is as follows:—

"La Cour etc....

"Considérant qu'au moment de la signification faite de la saisie-arrêt de la demanderesse le 11 mars, la tiers-saisie ne devait rien au défendeur, et n'est devenue sa débitrice que postérieurement à la saisie-arrêt prise entre ses mains, c'est-à-dire le 12 mars 1879, et que pour cette raison il faut considérer cette saisie comme prématurée, et frappant dans le vide;

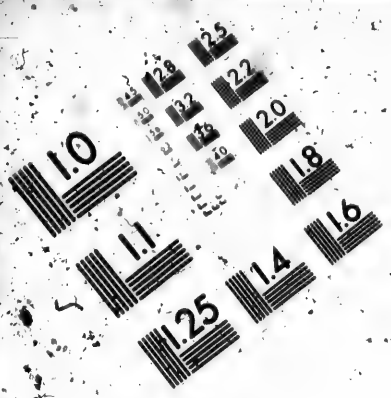
"Considérant qu'il y a erreur," &c.

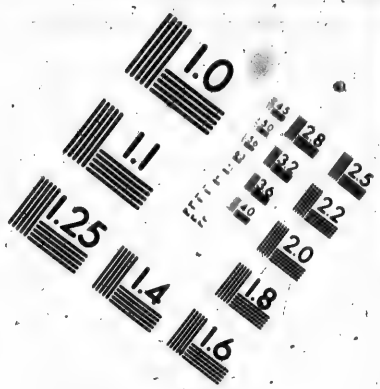
Judgment reversed.

Béique, for plaintiff.

J. O. Joseph, for defendant.

(J.K.)





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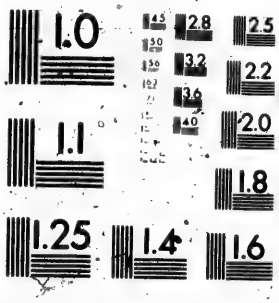

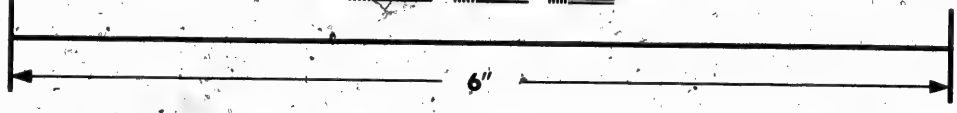

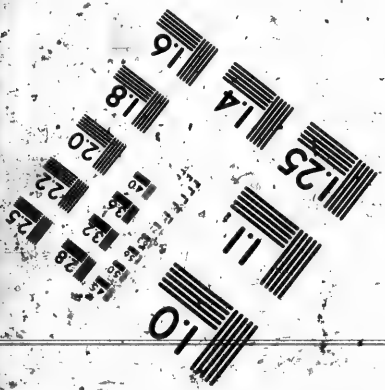

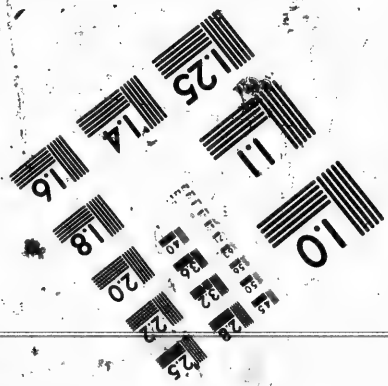

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COUR SUPERIEURE, 1877.

MONTREAL, 20 AVRIL 1877.

Coram DORION (W.), J.

No. 2225.

Perrault vs. *Desjardins.*

JUGE:—Qu'un détenteur poursuivi en déclaration d'hypothèque, qui a acquitté des créances hypothécaires antérieures, ne peut être tenu au délaissement qu'en autant que le créancier poursuivant lui donne caution que l'immeuble rapportera un prix suffisant pour le rembourser des créances qu'il a éteintes. C.C. 2073.

2. Que par le délaissement un débiteur est libéré de son engagement personnel envers son vendeur ou ses ayants-cause, et qu'il n'a pas droit d'exiger de cautionnement, qu'il ne sera pas troublé à raison de tel engagement.

Dans cette cause le défendeur poursuivi en déclaration d'hypothèque, déclare qu'il consent à délaisser l'immeuble hypothéqué en faveur du demandeur, à condition : 1o. Qu'il sera libéré de ses obligations envers son vendeur, et que caution lui soit donnée qu'il ne sera pas troublé à raison de telles obligations.

2o. Que le demandeur lui donne caution de faire porter l'immeuble à si haut prix qu'il sera remboursé intégralement du prix des créances antérieures à celle du demandeur, qu'il a acquittées.

La preuve fit voir qu'en effet le défendeur avait payé la somme de $287 pour libérer l'immeuble d'une hypothèque qui primait celle du demandeur.

A l'argument, l'avocat du défendeur cita, à l'appui de son opinion, Troplong, Traité des priviléges et hypothèques, No. 805, commentant l'art. 2170 du Code Napoléon, qui correspond à notre article 2073; cet auteur s'exprime comme suit: "la troisième exception relevée par quelques auteurs c'est l'exception tirée "de ce que le tiers-détenteur aurait payé, jusqu'à concurrence de la valeur de "l'immeuble des créanciers hypothécaires antérieurs au poursuivant et dont il a "subrogation légale. Il n'est pas raisonnable qu'un tiers-acquéreur qui a payé "les premiers créanciers et autant ou plus que le fonds peut valoir puisse être "dépossédé impunément et sans apparence de profit, par un dernier créancier, et "que celui-ci fasse vendre opiniatrement un fonds sur lequel il n'a rien à pré-"tendre suivant les apparences. Tout au moins faut-il que le créancier donne "caution de le faire valoir, et de se charger des frais, dommages et intérêts qu'il "peut causer par une poursuite volontaire et frustratoire."

Plusieurs auteurs, entr'autres Henrys, p. 281, Bourjon, p. 445, Grenier, No. 335, et Pothier, Introduction au Titre XX, No. 40 de la Coutume d'Orléans, soutiennent cette opinion qu'ont embrassée nos Cours de Justice. Dans la cause de Tessier vs. Falardeau, rapportée au 6e vol. Déc. des Trib., p. 163, il fut jugé que la position de celui qui s'était engagé à payer des créances hypothécaires antérieures à celles du poursuivant, n'était pas la même que celle du tiers-acquéreur qui les avait acquittées; reconnaissant le privilége de ce dernier, et son droit d'exiger caution qu'il sera indemnisé.

Son Honneur, le juge W. Dorion déclara par son jugement: que le délaissement libère l'acheteur de son engagement personnel avec le vendeur, et qu'il n'a pas droit d'exiger un cautionnement qu'il ne sera pas troublé à raison de tel

engagement; mais il maintint la seconde prétention du défendeur fondée sur l'art. 2073, C.C., et ordonna au demandeur avant de faire droit sur ses conclusions de donner le cautionnement demandé. Parrault vs. Desjardins.

Le demandeur ne s'étant pas conformé à cette ordonnance, son action fut déboutée avec dépens.

Lacoste & Globensky, avocats du demandeur.

A. Desjardins, avocat du défendeur.

(P.E.L.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 21st JUNE, 1879.

Coram SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 121.

PRÉVOST, APPELLANT;

AND

RODGERS ET AL., RESPONDENTS.

HELD:—That where parties intervene in the case of a *saisie-arrêt simple*, and claim to be proprietors of the things seized, and, instead of contesting plaintiff's claim, give security that the goods shall be forthcoming to abide the future judgment of the Court, and thus get possession of the things seized, and suffer the plaintiff to take a judgment in the case, declaring the seizure good and valid, such parties cannot oppose the sale of the things seized in execution of said judgment, on the ground that they are the proprietors thereof.

TESSIER, J. Il s'agit d'une question assez compliquée de privilége d'ouvrier sur certaine quantité de pierre taillée par le demandeur Prévost et ses cédants, et sur des outils.

Cette question est compliquée d'une question de procédure ou d'acquiescement par Rodgers au privilége du demandeur, parce que le demandeur Prévost employé par Wilson, un sous-contracteur, a poursuivi Wilson en accompagnant son action d'un arrêt simple sur la pierre en question qui se trouvait dans une carrière à Ste. Geneviève, où le demandeur avait taillé cette pierre. Wilson, sous-contracteur de Rodgers & Kelly avait, par sous-contrat d'exploitation, la possession de cette carrière appartenant à Rodgers, et le demandeur et ses co-cédants ouvriers, avaient jusqu'à un certain point une possession précaire des morceaux de pierre transformés ou taillés par eux.

La saisie-arrêt simple a été déclarée valable par un jugement de la Cour Supérieure le 12 septembre 1877, et le privilége du demandeur déclaré, de sorte que vis-à-vis Wilson, qui n'a pas appelé de ce jugement, il y a chose jugée, mais cette chose jugée prévaut-elle contre Rodgers? On allègue que Rodgers, durant l'instance avant le jugement, s'est porté partie intervenante, mais n'a pas poursuivi son intervention; on allègue que Rodgers, durant l'instance, voulant avoir la pierre en question et les outils saisis, les a obtenus provisoirement par un ordre d'un juge en donnant un cautionnement le 26 février 1877 "to the

Prevost and Rodgers.

extent of $856.76," montant de la demande, avec la condition, "that the goods seized shall be forthcoming to abide the judgment of the said Court relative thereto." Ce jugement a été rendu plus tard, le 12 septembre 1877, "déclarant "la saisie valable et ordonnant la vente des effets saisis."

Il y a bien à reprocher à Rodgers & Kelly de n'avoir pas fait valoir leurs droits plus tôt et d'avoir laissé encourir au demandeur des frais assez considérables pour établir son droit.

L'intimé Rodgers a été notifié par un nouveau bref d'exécution *venditioni exponas* de produire les effets saisis d'accord avec son cautionnement. Il a refusé de le faire, mais a produit une opposition réclamant la propriété des effets en question.

Si l'on compare ce cautionnement judiciaire à un cautionnement ordinaire, permettrait-on à une caution qui aurait garanti la production d'effets à une autre personne, à un créancier pour sa sûreté, de prendre plus tard une position contradictoire et incompatible et de dire, je ne suis plus caution de la production des effets, mais j'en suis le propriétaire.

Si un créancier, si un notaire instrumentant, comparait à un acte sans déclarer une hypothèque qu'il aurait sur un immeuble vendu par cet acte, cette personne est considérée avoir renoncé à cette hypothèque. Ceci est fondé sur le principe de bonne foi et de vigilance, qui sont la base de toutes les transactions.

Ainsi donc il y a ici un acquiescement de Rodgers à cette saisie déclarée valable, dans cette cause dans laquelle il a été jusqu'à un certain point partie comme intervenant et comme caution.

Cette Cour s'accorde, du moins à la majorité des juges, sur ce point, et il en résulte que le jugement rendu en révision est renversé, et que cette Cour maintient le jugement donné par l'Honorable Juge de la Cour Supérieure en première instance, en déboutant l'opposition de l'intimé Rodgers.

Cette Cour croit qu'elle n'a pas à se prononcer sur la question de privilége, mais elle prononce que par son acquiescement et l'effet de son cautionnement, l'intimé Rodgers a renoncé au droit de contester ce privilége et la saisie prononcée valable par le jugement de la Cour Inférieure.

MONK, J., expressed his dissent from the judgment about to be rendered, and the other Judges concurred in the views expressed by Tessier, J.

The following was the written judgment of the Court:—

"La Cour * * * considérant que les intimés ont obtenu la possession des articles saisis en cette cause, savoir * * * sur un ordre de l'un des juges de la Cour Supérieure donné le 23 février 1877, sur leur requête et à la condition qu'ils donneraient des cautions jusqu'à concurrence du montant de l'action du demandeur, et considérant que le demandeur ayant obtenu jugement contre le défendeur le 12 septembre 1877, par lequel jugement la saisie-arrêt avant jugement faite à la poursuite du dit demandeur a été déclarée bonne et valable;

"Et considérant que les dits intimés qui ont contracté l'obligation de rapporter les effets ainsi saisis ne peuvent, avant d'avoir rempli l'obligation qui leur a été imposée par ordre de la Cour Supérieure, contester la propriété des dits effets après que la saisie-arrêt a été déclarée bonne et valable, sans avoir au préalable rempli la condition sous laquelle ils ont obtenu la possession des dits

effets en les rapportant devant la Cour, ou en en rapportant la valeur jusqu'à concurrence de la créance du dit demandeur ; Prevost and Rodgers.

"Et considérant que l'opposition des dits intimés par laquelle ils réclament la propriété des dits effets est mal fondée, et qu'il y a erreur dans le jugement rendu par la Cour Supérieure, siégeant en révision à Montréal le trentième jour de mars 1878 ;

"Cette Cour casse et annule le dit jugement du 30 mars 1878, et procédant à rendre le jugement qu'aurait dû rendre la dite Cour de Révision renvoie, pour les raisons ci-dessus, l'opposition des dits opposants, et condamne les dits opposants à payer à l'appelant les frais encourus tant en Cour de première instance, qu'en révision et sur le présent appel. (*Dissentiente*, l'Honorable M. le Juge Monk.)"

Judgment of C. of R. reversed.

Coursol & Co., for appellant.
Abbott & Co., for respondents.
(S.B.)

COURT OF REVIEW, 1879.

MONTREAL, 31st OCTOBER, 1879.

Coram MACKAY, J., RAINVILLE, J., PAPINEAU, J.

No. 403.

Thayer vs. *Ansell, Moss et al.*, opposants, and *Thayer*, contesting.

HELD :—Notwithstanding the pendency of a hypothecary action, the alienation of the immoveable by the holder against whom the action is brought has full force and effect against the creditor bringing such action, if the creditor's claim be one, the registration of which had to be renewed under the cadastral system, and the renewal had not been duly effected before the purchaser registered his title.

The judgment inscribed in Review was rendered by the Superior Court, Montreal, JOHNSON, J., February 28, 1879, as follows :—

JOHNSON, J. The point in this case is of some importance, and, as far as I can ascertain, has never presented itself before. The plaintiff has seized, under a judgment obtained against the defendant, property which the opposants claim as belonging to them. The facts of the case are as follows : The opposants became proprietors of the undivided half of an immoveable at Cote St. Catherine, by deed of sale from the defendant, in 1874. In October, 1875, they acquired the remaining half—also by deed of sale from the defendant. Before the latter deed was signed, Mr. Cushing, the notary, at the request of one of the opposants, went to the registry office and made search to ascertain if there were any encumbrances registered against the property, and having reported that there were none, the deed was executed. Some time afterwards, the property in question was seized under the plaintiff's execution, and the opposants then became aware, for the first time, that in July, 1875, the plaintiff had brought an action against the defendant for a balance due to him under a former deed of sale to the *auteur* of the defendant, and that the plaintiff had obtained judgment in that action in October, 1875, two days before the second deed of sale,

Thayer vs. Ansell.

from the defendant to the opposants, was passed. The opposants thereupon filed their opposition, founded on the two deeds above mentioned. The plaintiff, in his contestation, admits the first deed, but disputes the second, and claims the right (under Article 2074 C. C.) to proceed to the sale of the one half. The opposants make answer that at the time the second deed was executed and registered, the plaintiff had no registered rights of any kind upon this property, available against third parties whose rights were registered, and that his action and judgment therefore can have no effect as against the opposants.

The plaintiff's claim is founded on a deed executed before the cadastral system came into force. The opposants' deed was executed in accordance with the requirements of the new system—that is, contained a description of the property by its cadastral number, and was duly registered. No renewal of the registration of plaintiff's deed had at this time taken place; and the books of the registry office, therefore, did not show that such a claim existed. The opposants' contention upon these facts is that the plaintiff's claim, in consequence of the non-renewal of registration, is of no effect against them. The position of the plaintiff, on the contrary, is that his rights were never impaired at all by the sale to the opposants, which, under the law, as it is contended, had not even the effect of alienating the property. I have said that the point thus raised appears to me important, and I have taken time to consider it, and am now to give judgment, and state the grounds on which I give it.

The Article of the Code (2074) is founded on the Statute of 1859 (22 Vict. c. 51), which is reproduced in Consolidated Statutes of Lower Canada, c. 47. It does not give the reason, but only the effect, of the original enactment, which was directed against fraudulent conveyances, as their titles and preamble will show: the fraud sought to be defeated being that of debtors exposing their hypothecary creditors to the reiterated expense of new actions as fast as the debtor could find new purchasers. The law, as expressed in the Code (Art. 2074), is:—"The alienation of an immoveable by the holder against whom the hypothecary action is brought, is of no effect against the creditor bringing the action, unless the purchaser deposits the amount of the debt, interest and costs due to such creditor." The language of the Statute is:—"Every sale or alienation of any nature whatsoever of any immoveable charged with hypothec *duly registered prior* to such sale or alienation, after proceedings have been commenced for the recovery of the debt with the payment of which such immoveable is charged, shall be null and void as regards the creditor who has commenced such proceedings, and such creditor may proceed against the defendant in such action to the seizure and sale of such immoveable, as though such sale had never taken place, provided that in such case, the purchaser of the immoveable so seized may prevent the sale thereof by tendering with his opposition, and depositing in the office of the sheriff, the amount of the debt with which such immoveable is charged, including principal, interest and costs, and not otherwise," &c. There is nothing in the Statute, nor in the Code, that annuls the sale as between the vendor and the purchaser; it is merely said that such a sale does not affect the rights of the creditor, and does not stop the execution, unless the money is paid. The purchasers here, therefore (the opposants,) had a title

from their vendor—a title, it is true, that was of no avail against a creditor *whose hypothec was duly registered* previously (those are the words of the Statute,) and who had commenced an action; but at the same time, a title that was perfect, as between himself and his vendor; a title which he could defend even against the hypothecary creditor by simply paying the money; a title that he could register, and, in fact, did register before the creditor registered his.

Now, coming to the cadastral system, we find that it is said in article 2173, "*If such renewal be not effected, the real rights preserved by the first registration have no effect against other creditors and subsequent purchasers whose claims have been regularly registered.*" What is "regularly registered?" What was it at that time? It is to be remembered that under the Code a hypothec has no effectual existence at all without registration (Articles 2047 and 2130), and real rights rank according to the date of their registration (2130). Article 2172 requires renewal of registration of any real right existing before the cadastral system came into force. Article 2173 declares, as we have already seen, that if such renewal is not effected, the real rights which were preserved up to a certain time by a first registration have no effect against subsequent purchasers whose claims have been regularly registered. The expression "real rights" removes all possible doubt as to whether this article was intended to apply to the hypothec created in favor of a vendor by a deed of sale.

Here, then, we have two laws—an old law and a new law. The meaning of either of them, taken alone, is not doubtful; but we are concerned not so much with the meaning of either of them of itself, as with the effect of the later law on the previous one.

The Statute and the Article 2047 said to the possessors of real rights in the persons of hypothecary creditors:—"You have mortgages which new purchasers cannot defeat or impede except by paying the money, if you only register your rights, and bring your actions." The second law said to these creditors: "Your rights cannot be preserved against subsequent purchasers unless you take the trouble to renew your registration in a given time." Are we then to have two systems of preserving hypothecs since the cadastral system has come into force? Can a hypothecary creditor bring his action, and wait for years without re-registering, and thus prevent a subsequent purchaser from acquiring a valid title? If he can, what becomes of our registration system? for lenders by the score will be ready to advance their money upon property appearing free on the books, and will then be exposed to hear that a real right, though not registered, still exists in virtue of the mere pendency of an action. The Article 2173 is absolute in its terms. The plaintiff, therefore, was bound to have renewed the registration of his "real right"; and not having done so within the period allowed by law, his right becomes of no effect, as against the opposants, whose deed was regularly registered. These words "regularly registered" can only mean regularly registered as required by Article 2172, and if not so registered, the effect of the omission must, in my opinion, be that which is declared by Article 2173. As regards the Article 2074, under which

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the plaintiff claims a right to proceed, the object of that Article, I hold, was to protect a creditor in the exercise of hypothecary rights that he possessed, not to give him rights that he did not possess or that he had lost. The Article decides nothing as to whether in a given case a creditor has, or has not, a hypothecary right which he can enforce against a third party: that is left to be decided by other Articles, and notably by Art. 2173; but supposing him to have such a right, Art. 2074 will protect him in the exercise of it. If the right does not exist, or has been lost, there is nothing left to protect, and Art. 2074 becomes then of no use. The plaintiff's contestation could only be maintained by holding that he has a hypothecary right available against third parties, notwithstanding the non-renewal of registration: but how could such a holding be supported in the face of Art. 2173? If, then, the plaintiff had no hypothecary right available against the opposante, his hypothecary action unsupported by a hypothecary right can have no effect against them. Therefore, on the whole, I am of opinion that the right of the creditor arising from the exercise of the action under Art. 2074 must be subordinated to the later enactment contained in Articles 2172 and 2173, and the opposition must be maintained, and the contestation dismissed as respects the one-half of the property that is in question.

There was another and totally distinct ground of contestation urged, viz., that the last deed to the opposants was fraudulent and without consideration; but the proof made, as far as it goes, is directly opposed to that pretension. There is no attempt made to set aside the deed, and no allegation of the insolvency of the vendor, and under Art. 2085, knowledge by the opposants of the plaintiff's unregistered rights would have no effect.

In Review,

MACKAY, J., dissented, being of opinion that Moss was not in good faith. His opposition was founded on a purchase of a property, on which plaintiff had a hypothecary claim. The registration of this claim had not been renewed, as the law requires. It appeared that Ansell was about to institute an appeal in a certain case, and Moss was to be surety for the costs. It was in consideration of this that the deed was passed to Moss. But the appeal was abandoned, and Moss, therefore, had not given any consideration for the deed to him.

PAPINEAU, J.—Le 20 juillet 1875 une action hypothécaire est signifiée au défendeur, fondée sur acte de vente du 4 juillet 1872, par le demandeur au nommé B. Savage, enrégistré le 13 août 1872.

Dans cette action le demandeur allègue que le défendeur s'est obligé personnellement au paiement de la dette réclamée.

Les conclusions ne sont pas personnelles contre le défendeur, mais seulement en délaissement de l'immeuble et, à défaut de délaissement, que le défendeur soit condamné personnellement.

Le demandeur admet, dans son factum, que le temps pour renouveler l'enrégistrement de son acte de vente, était expiré, depuis deux jours, à la date de la signification de cette action.

Le jugement sur cette action est du 27 octobre 1875; la saisie du 22 mai 1876.

A cette saisie, Samuel Moss et al., font une opposition afin d'annuler, basée

sur deux actes de vente en vertu desquels ils ont acheté séparément les deux moitiés de l'immeuble saisi.

Une de ces ventes, celle du 29 de juillet 1874, est antérieure à l'action hypothécaire du demandeur et est admise comme valide, par le demandeur.

L'autre vente est du 29 octobre 1875, enrégistrée le 9 novembre 1875. Le prix de cette vente est $1 " and other good and valuable consideration heretofore " had and received the receipt whereof is hereby acknowledged whereof quit."

Le demandeur conteste l'opposition, quant à la seconde moitié indivise de l'immeuble, acquise par les opposants le 29 octobre 1875, parceque, lors de cette vente, le défendeur était poursuivi hypothécairement comme détenteur de cet immeuble, et même que le jugement était rendu contre lui depuis deux jours et qu'il était alors incapable de la vendre.

Par une seconde contestation, le demandeur allègue que l'acte de vente du 29 octobre 1875 aux opposants ne leur a pas transféré la propriété: 1o. parcequ'ils n'ont donné aucune considération; 2o. parceque cet acte est simulé; 3o. parcequ'il a été fait collusoirement avec le défendeur pour frauder le demandeur; 4o. parceque les opposants n'ont eu la propriété que comme sûreté collatérale contre un cautionnement qu'ils devaient fournir pour un appel pris par le défendeur, lequel cautionnement n'a jamais été fourni par les opposants.

Les opposants ont répondu en droit à la première contestation, mais leur réponse en droit a été renvoyée.

En fait, ils répondent que l'acte de vente sur lequel le demandeur fonde son droit de privilége et hypothèque n'était pas régulièrement enregistré, en ce que le numéro du cadastre de la propriété vendue ne se trouve pas donné dans cet acte, et que l'enregistrement n'a pas été renouvelé dans le temps prescrit par la loi, ni même avant le 9 de novembre 1875, date de l'enregistrement de l'acte des opposants, et que son privilége et hypothèque est sans effet quant aux dits opposants.

Ils répondent, à la seconde contestation, que leur acte du 29 octobre 1875 est bon, et qu'il a été consenti pour bonne et valable considération et sans aucune intention de frauder le demandeur.

Il y a dénégation générale des allégués de la contestation.

Par ses réponses aux articulations, le demandeur admet que le temps pour renouveler l'enregistrement de son acte expirait le 15 juillet 1875, et qu'il n'a pas renouvelé cet enregistrement.

Il n'y a pas de preuve suffisante de fraude entre le demandeur et l'opposant, ni défaut de considération, pour permettre à la Cour de déclarer que tel est le cas.

La question de droit est pure et simple. L'action du demandeur pouvait-elle avoir l'effet que donne l'article 2074 du Code Civil à l'action hypothécaire, de rendre sans effet à l'égard du poursuivant, l'aliénation faite par le détenteur poursuivi, à moins que le nouvel acquéreur ne consigne le montant de la dette, intérêt et dépens dus au créancier poursuivant? La section 1ère du chap. 47 S. R. B. C. d'où est tiré l'art. 2074 du Code était bien plus claire, sur ce point, que cet article, et ne laissait aucun doute qu'il fallait que l'action fût basée sur une hypothèque dûment enregistrée pour avoir cet effet.

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L'article 2074, pris isolément, ne parait pas exiger cette condition, mais s'il est rapproché de l'article 2056, on voit que la loi est conservée, quant à cela, telle qu'elle était dans le Statut Refondu. "Les créanciers ayant privi-"lége, ou *hypothèque enregistrée* sur un immeuble, le suivent en quelques "mains qu'il passe, dit cet article, et ont droit de le faire vendre en justice et "de se faire payer *suivant le rang de leur créance*, sur les deniers provenant de "cette vente."

Cet article prévoit deux cas: celui du privilége qui n'a pas besoin d'être enregistré, comme par exemple les priviléges pour droits seigneuriaux, celui assurant le paiement des cotisations pour constructions d'églises, le paiement des taxes municipales et scolaires, etc. Et il prévoit aussi le cas de l'hypothèque enregistrée.

Le privilége du vendeur, qui est celui sur lequel s'appuie le demandeur, dans la présente instance, n'est pas au nombre de ceux exemptés de la formalité de l'enregistrement, en vertu de l'article 2084 du code. Le demandeur devait donc faire enregistrer son droit hypothécaire pour le suivre en mains tierces. L'article 2172 l'obligeait à faire renouveler son enregistrement dans le délai fixé et qui expirait pour lui le 15 de juillet, cinq jours avant la date de la signification de son action qui n'a été faite au défendeur que le 20 juillet. Le droit du demandeur est donc sujet aux termes suivants de l'article 2173: "A défaut "de tel renouvellement, les *droits réels* conservés par le premier enregistrement "n'ont aucun effet à l'égard .....des acquéreurs subséquents dont les droits "sont régulièrement enregistrés."

Les opposants sont des acquéreurs subséquents à la date fixée pour le renouvellement de l'enregistrement des droits réels du demandeur, et leurs droits sont régulièrement enregistrés.

L'action hypothécaire du demandeur pouvait être intentée contre le défendeur, mais l'effet en était périssable comme le droit sur laquel elle était fondée, par le défaut de renouvellement de l'enregistrement de ce droit. Le demandeur doit imputer son malheur à son manque de diligence.

Le jugement est conforme à la loi et doit être confirmé.

Lunn & Crump, for opposants.

Geoffrion & Co., for plaintiff contesting.

(J.K)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 4TH FEBRUARY, 1879.

Coram SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 75.

THE NATIONAL INSURANCE COMPANY,
(*Plaintiffs in the Court below,*)
APPELLANTS;

AND

WARREN PAIGE,
(*Defendant in the Court below,*)
RESPONDENT.

HELD:—That when a subscription to the capital stock of an incorporated company, having its head office in the District of Montreal, is made by a defendant domiciled in another district, and who has subscribed to this stock in the other district, the defendant cannot be summoned to appear in the District of Montreal.

This is an appeal from a judgment of the Superior Court (PAPINEAU, J.) dismissing the action, upon a declinatory exception fyled by the defendant.

The declaration alleges: that the plaintiffs are a body corporate, having their principal place of business at the city of Montreal; that defendant is the holder of ten shares, of $100 each, in the capital stock of the Company; that on the 25th June, 1877, the Company made two calls of ten per cent each, payable respectively at the office in Montreal, on the 27th days of July and August then next (1877); that the defendant was duly notified; concluding for $200, with interest on $100 from the 27th July, and on the further sum of $100 from the 27th of August.

Defendant pleaded by a declinatory exception: that, as appears by the writ and declaration, he is a resident of Compton Centre, in the District of St. Francis, and that, as appears by the bailiff's return, he was there served; that any right of action which may exist originated in the said District of St. Francis.

Plaintiffs answered: that the right of action arose in the District of Montreal, where the head office is, and where the stock was allotted and calls ordered and made.

Defendant replied: that the stock was subscribed for at [redacted] Township of Compton, in the said District of St. Francis.

The subscription list upon which the respondent's name appears is headed as follows:

"Capital $2,000,000. Shares, $100 each. Subscription list of the capital stock of the 'National Insurance Company,' Montreal.

"The undersigned hereby agree to take, and they hereby do take and subscribe to the number of shares in the said Company set opposite to their respective signatures, or any portion thereof, as may be allotted by the Provisional Board of Directors, the whole subject to the conditions of the Act incorporating the said Company."

It was proved that defendant subscribed his name to plaintiffs' stock book at his, the defendant's, residence or hotel in Compton Centre, and gave his note for 10 per cent. of his stock subscription.

The Company's charter, Vic: , sec. 6, enacts that "The shares of capital

The National Insurance Co. and Paige.

"stock subscribed for shall be paid in and by such instalments and at such "times and places as the said Directors shall appoint."

C. S. L. C. cap. 82, sec. 26, "Any action, suit, or proceeding may be commenced at the place where the terms of the Superior or Circuit Court are "held in any District or Circuit, provided the cause of such action, suit or proceeding, respectively, arose within such District or Circuit." * * *

C. C. Art. 34: "In matters purely personal * * the defendant may be "summoned * * before the Court of the place where the right of action "originated."

The judgment of the Superior Court, 1878, Hon. Mr. Justice Papineau, is: * * "Considering that there is no legal and sufficient proof that the acceptance of the subscriptions to the capital stock of the said plaintiffs should be made at Montreal, nor that it had been made, nor that a number of shares should be allotted to the subscribers to become shareholders, nor that any number of shares has ever been allotted to the defendant on account of his subscription;

"Considering that it is proved on the contrary that, in subscribing, he paid by his note, which he afterwards renewed, ten per cent. on the amount of his shares;

"Considering that a call on stock is not the cause of a right of action, but the determination of the date of maturity of the payments to be made in virtue of the obligation contracted by defendant in making his subscription, which appears to have been accepted *instanter*;

"Considering for all these reasons that the proof made does not establish that the cause of action took its origin in the District of Montreal;

"Considering, moreover, that the defendant has not his domicile in the District of Montreal, and that the service of the defendant was not made in this District;

"Considering the said *exception declinatoire* well founded, doth maintain it and dismiss plaintiff's action *sauf à se pourvoir* before the tribunal of the defendant, with costs." * * *

Appellants' authorities:
Clark vs. Ritchey, 9 L. C. J. 234, and 14 L. C. R. 48, S. C.
Pattison vs. The Mutual Insurance Co. of Stanstead and Sherbrooke, 16 L. C. J. 25, S. C. R., 1872.
Lapierre vs. Gauvreau, 17 L. C. J. 241, S. C. R., 1873.
Glarton vs. McLean et al., R. L. 654, S. C., 1873.
Respondent's authorities:
Rousseau vs. Hughes, 8 L. C. R. 187.
Sénécal vs. Chenevert, 6 L. C. J. 46, Q. B.
Gault et al. vs. Wright et al., S. C., 13 L. C. J. 60.
Jackson et al. vs. Gosworthy et al., S. C., 12 L. C. R. 416.
Mulholland et al. vs. La Compagnie de Fonderie de A. Chagnon et al., S. C., 21 L. C. J. p. 114.
The Railway and Newspaper Advertising Company vs. Hamilton et al., S. C., 16 L. C. J., p. 28.
Pattison vs. The Mutual Insurance Company of Stanstead and Sherbrooke, S. C. in Review, 16 L. C. J., p. 25.

Judgment of S. C. confirmed.

Davidson & Monk, attorneys for appellants.
Ives, Brown & Merry, attorneys for respondent.
(J. L. M.)

COUR SUPERIEURE, 1880.

MONTREAL, 27 AVRIL 1880.

[EN CHAMBRE.]

Coram LAFRAMBOISE, J.

No. 901.

Maillioux vs. *Trudeau.*

JUGE :—1o. Que nonobstant le délai de huit jours établi par l'article 131 du C. de P. C. pour plaider au mérite après mise en demeure, il est permis au juge en Chambre de prolonger ce délai bien qu'il ne soit pas encore expiré.

2o. Que le juge en Chambre possède le pouvoir de décréter la déchéance du droit acquis au demandeur de forclore, en vertu de cet article, le défendeur en défaut de plaider au mérite.

Le défendeur produisit en cette cause une exception dilatoire fondée sur le fait que depuis l'institution de son action, le demandeur avait quitté le Canada pour les Etats-Unis, et demandant qu'il fût tenu de fournir le cautionnement pour frais et la procuration auxquels avait droit le défendeur.

Le demandeur prétendant que cette exception était proposée uniquement pour retarder sa cause, avant d'y répondre, requit le défendeur de plaider au mérite, le notifiant qu'à défaut de ce faire dans le délai prescrit, il serait forclos conformément aux dispositions de l'art. 131 C. P. C.

Au lieu de plaider au mérite dans ce délai, le défendeur, pour obtenir la prolongation du délai fixé à huit jours par cet article, présenta au juge en Chambre une requête dont voici les principales allégations :

" Que le 16 avril courant, le défendeur produisit en cette cause, une exception dilatoire basée sur le fait que depuis l'émanation du bref de sommation le demandeur avait quitté le Canada, etc. ;

" Que par sa dite exception le défendeur a demandé que vu l'absence du demandeur tous procédés fussent suspendus jusqu'à ce qu'il eût donné caution pour les frais ;

" Que le 19 du même mois le défendeur fit une motion, demandant pour les causes y exprimées, que le demandeur n'*eût pas la permission* de procéder *in formâ pauperis* ; mais que la dite motion, vu l'absence du juge, fût continuée au 3 mai prochain ;

" Que le 22 avril courant, le demandeur requit le défendeur de plaider au mérite nonobstant l'exception dilatoire ;

" Que cette exception dilatoire et cette motion ont été faites de bonne foi, et que le défendeur a un grand intérêt à ce qu'un jugement intervienne sur la dite exception et la dite motion avant de plaider au mérite ; ce qui lui occasionnerait des frais considérables ;

" Pourquoi le défendeur demande à vos Honneurs de lui accorder délai pour plaider au mérite jusqu'à la date du jugement à intervenir sur la dite exception et la dite motion ; dépens réservés."

J. G. D'Amour, pour le demandeur, résista à cette requête, prétendant que l'art. 131 du C. P. C., en vertu duquel le défendeur avait été requis de plaider au mérite, était de droit étroit, et conférait au demandeur des priviléges dont il

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ne pouvait, pour aucune raison, être privé ; cet article imposait en même temps au défendeur l'obligation indispensable de plaider au mérite sous huit jours de la réquisition, *à peine de forclusion* ; que rien dans le Code de Procédure n'autorisait le juge en Chambre, pas même le tribunal, à prolonger le délai en question et qu'il ne pouvait le faire qu'en violation des droits acquis au demandeur. Il ajouta que ce délai n'aurait pu être étendu que si la loi y eût pourvu d'une manière spéciale et formelle ; mais qu'un tel pouvoir n'était dévolu ni au juge en Chambre ni même au tribunal. Le Code était rempli d'exemples au soutien de cette prétention du demandeur. Ainsi, il ne serait pas, pour aucune raison, permis au tribunal (encore moins au juge en Chambre) de relever du défaut de comparaître, le défendeur contre qui un certificat de défaut est enregistré, si l'art. 87 du C. P. C. ne lui conférait ce pouvoir.

Il en est de même des délais relatifs à la production des plaidoyers au mérite dans les cas ordinaires ; car après l'expiration de ces délais, le tribunal ne pourrait permettre telle production si l'art. 140 du C. P. C. ne l'y autorisait expressément. Dans le cas actuel, il ne s'agissait pas de se faire relever du défaut de plaider au mérite dans le délai fixé par l'art. 131, mais de prolonger ce délai qui n'était pas encore expiré. Ce que demandait le défendeur n'était donc rien moins qu'une dispense pour ne pas suivre la loi telle qu'énoncée dans cet article, car il était encore à temps pour s'y conformer.

Il n'est que juste d'ajouter que la requête du défendeur n'était appuyée d'aucune espèce de preuve, au grand oubli de l'axiôme bien connu : *In judiciis non creditur nisi juratis.* Le défendeur se contentait d'énoncer des prétentions sans s'occuper de les justifier.

L. O. Taillon, de la part du défendeur, prétendit que la requête de ce dernier méritait d'être accueilli favorablement, car avant tout le défendeur était de bonne foi. Il ne pouvait en dire autant du demandeur qui le poursuivait *in formâ pauperis* pour injures verbales, et dont le seul but était de lui occasionner des dépenses et même de l'exploiter.

Il n'hésitait pas à dire que le juge en Chambre pouvait accorder au défendeur les conclusions de sa requête, car rien, selon lui, n'empêchait que le délai en question ne fût prolongé à volonté : d'ailleurs, la loi permettait au juge en termes formels d'étendre ce délai ; et au soutien de cette assertion, il cita un passage des Statuts Refondus du Bas-Canada qui paraissait trancher la question. Malheureusement cette prétendue autorité était depuis longtemps abrogée par les dispositions contraires du Code de Procédure Civile qui seul régit aujourd'hui tout ce qui se rattache aux délais, ou aux pouvoirs du tribunal relativement aux délais et notamment au délai de huit jours établi par l'art. 131 de ce code et qui seul faisait le sujet de la difficulté.

Voici le jugement de l'honorable juge en Chambre :

" Parties ouïes par leurs avocats respectifs sur la requête du défendeur produite ce jour.

. . . . . .

" Nous, soussigné, l'un des juges de la Cour Supérieure, siégeant dans et pour le district de Montréal, accordons au défendeur délai pour plaider au mérite

jusqu'à la date du jugement à intervenir sur l'exception dilatoire plaidée en cette cause par le dit défendeur ; dépens réservés.

" Montréal 27 avril 1880.

" M. LAFRAMBOISE,
" J. C. S."

Requête accordée.

D'Amour & Dumas, pour le demandeur.
Taillon & Nantel, pour le défendeur.
(J. G. D.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 20TH DECEMBER, 1879.

Coram SIR A. A. DORION, C. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 198.

LA COMPAGNIE DU CHEMIN DE FER DES LAURENTIDES,

(*Plaintiff in the Court below,*)

APPELLANT;

AND

LA CORPORATION DE LA PAROISSE DE ST. LIN,

(*Defendant in the Court below,*)

RESPONDENT.

HELD:—Where no delay is fixed by the contract for the performance of an alternative obligation, the debtor can only be deprived of his option by the expiration of a delay fixed by a judgment against him ; and, therefore, where the amount of a municipal corporation's subscription to a railway company was payable either in debentures or money, the corporation could not, by a mere notarial protest served on it fixing a time for the delivery of the debentures, be deprived of its option to pay in debentures, and the action against the corporation should have given the alternative.

RAMSAY, J. (*diss.*)—I must dissent from the judgment about to be rendered in this case. The action is for the amount of a subscription to a railway by the party respondent. This action is met by a demurrer to the effect that the obligation of the respondent was to give cash or debentures, and that the action only asks for cash. We all know the doctrine as to alternative obligations on which respondents rely, but that refers to two things (*choses*), and not to a determinate thing or money. Money is the alternative of every obligation, and it is always competent for a plaintiff to say, even when there is no stipulation, you promised to give me a certain thing, you have not done it ; pay me the equivalent in money. I should, therefore, reverse the decision of the Court below.

Sir A. A. DORION, C. J.—Cette action a été portée par la compagnie appelante pour recouvrer une somme de $30,000, étant le montant d'actions souscrites, par la corporation intimée, dans le fonds social pour la construction du chemin à lisses des Laurentides. La demande a été renvoyée sur une défense en droit, parce qu'ainsi qu'il est allégué dans la déclaration, ces actions avaient été souscrites conformément aux règlements à cet effet, à la condition que la corporation

Cie. du Chemin de Fer des Laurentides, and Corporation de St. Lin.

intimée pouvait payer, soit en argent soit en débentures au pair, à vingt ans de date, et portant intérêt à six pour cent par année, à son choix, lorsque le chemin serait en opération et que l'option de payer en débentures ne lui était pas laissée par l'action.

Il ne peut y avoir de doute que lorsqu'un débiteur s'est obligé de payer l'une de deux choses, il ne doit ni l'une, ni l'autre jusqu'à ce qu'il ait fait son choix, ou qu'il ait été déchu du droit de le faire, et qu'il faut que le créancier lui donne l'option de payer l'une ou l'autre conformément à la convention intervenue entr'eux. Art. 1093, 1094, C. C.

Pothier, oblig., No. 248: "Du principe par nous établi, que les choses comprises dans une obligation alternative sont toutes dues sans néanmoins qu'aucune soit due déterminément, il suit, 1o. que, pour que la demande du créancier soit régulière, il doit demander les deux choses, non pas à la vérité conjointement mais sous l'alternative sous laquelle elles lui sont dues. S'il demandait seulement une de ces choses sa demande ne serait pas régulière, parce qu'aucune des deux ne lui est due déterminément, mais les deux lui sont dues sous une alternative."

Voir aussi Demolombe, tome 26, No. 14.

L'appelante répond à cela que les actions étaient payables lorsque le chemin serait en opération, et que le 30 novembre 1877, après la mise en opération du chemin, elle a protesté la corporation intimée de lui payer le montant de ses actions soit en argent ou en débentures sous cinq jours, et que l'intimée ne l'ayant pas fait dans ce délai elle n'est plus à temps pour payer en débentures.

S'il dépendait de l'appelante de rendre le paiement exigible en argent au lieu de débentures en faisant un protêt et fixant elle-même l'époque à laquelle la corporation intimée serait tenue de lui fournir ses débentures, elle aurait pu tout aussi bien lui donner cinq minutes, que cinq jours comme elle l'a fait par son protêt, et dans un cas comme celui-ci, lorsqu'il n'y avait pas de délai fixé par la convention, que l'échéance du terme dépendait de l'accomplissement du chemin, fait qui ne pouvait être conuu que de l'appelante, et lorsque l'intimée avait, par conséquent, le droit de faire vérifier ce fait avant de payer, ce délai de cinq jours était à peu près aussi raisonnable que l'aurait été celui de cinq minutes.

Mais il ne dépendait pas du fait de l'appelante de priver l'intimée par un simple protêt, de l'option qui lui était donnée par la convention. Il est de règle que lorsque le contrat ou la loi ne fixe pas de terme dans lequel une obligation alternative sera exécutée, le débiteur ne peut être privé de son choix, qu'après l'expiration d'un délai fixé par un jugement contradictoire.

C'est la pratique journalière des actions hypothécaires où l'option de délaisser ou de payer est invariablement laissée au défendeur. Il y a bien d'autres occasions où cela se pratique. Dans toutes ces actions il faut faire prononcer la déchéance, et cela se fait au moyen d'un jugement qui déclare que faute par la partie d'opter sous un délai déterminé par le jugement même, elle sera déchue de l'option qu'elle avait, et sera tenue de payer purement et simplement le montant demandé.

La prétention que l'intimée ne peut plus fournir ses débentures, parcequ'elle ne peut les antidater et que des débentures payables à vingt-cinq ans de la date

actuelle ne seraient pas conformes à la convention, [illegible]te même pas le plus léger examen. Si une semblable objection pouvait prév[illegible]e, ce serait une preuve éclatante de l'insuffisance du système judiciaire ou cela pourrait arriver.

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La majorité de la Cour est d'opinion que le jugement doit être confirmé.

Judgment confirmed.

Lacoste & Globensky, for appellant.
Béique & Choquet, for respondent.
(J. K.)

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

14ME FEVRIER, 1880.

Coram SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER.

BOURGOIN ET AL.,

ET

APPELANTS;

LA COMPAGNIE DU CHEMIN DE FER DE MONTREAL, OTTAWA ET OCCIDENTAL, ET ROSS,

INTIMÉS.

JUGÉ:—1. L'indemnité ou compensation accordée par des arbitres nommés sous l'autorité de l'acte des chemins de fer, 1868, ne peut consister qu'en un capital ou somme d'argent fixé, et non en paiements mensuels futurs.

2. Tels arbitres n'ont pas le pouvoir d'ordonner la confection de certains travaux, ou de condamner la partie expropriante à exécuter tels travaux.

3. La Compagnie du chemin de fer de Montréal, Ottawa et Occidental ne pouvait se dissoudre sans l'autorisation du Parlement du Canada. (C. C. B. C., Art. 369.)

Le jugement dont est appel est rapporté au 23me vol. du L. C. Jurist, p. 96.

PER CURIAM.—The only question which has been fully argued upon the four appeals consolidated in this record is whether the judgment of the Court of Queen's Bench rendered in the first suit, No. 693, was right in annulling and setting aside the award of the 28th of July, 1876, upon either of the grounds stated in it. As to one of those grounds which proceeds upon the assumption that the lump sum of $35,013, awarded to the appellants, included the whole value of the land, and not merely the value of their interest as lessees, it is not necessary to say anything, because that objection has not been pressed.

The question, therefore, is reduced to this: can the judgment be supported on the other ground taken? Their Lordships confined the argument, in the first instance, to that question, because they thought that if the award was found to be invalid on the face of it, that finding would go far to dispose of all or most of the questions which have been litigated between the parties. They will, therefore, for the present, confine their attention to the first of the suits and the final judgment therein, nor will they go into the facts further than is required in order to elucidate the single point to be now determined. The appellants are four persons holding a quarry, as lessees, under a Mrs. Smith. They are sometimes described as working together in two partnerships of two each, as "Bourgoin et Fils" and "Bourgoin et La Montagne," but for all practical purposes they may be treated as the four joint lessees of the quarry. The respondents, who were the plaintiffs in the suit, are a Railway Company, styled on the record

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"The Montreal, Ottawa, and Western Railway Company." This Company was incorporated originally under another title, viz., "The Montreal Northern Colonization Railway Company," by an Act of the Legislature of the Province of Quebec (32 Vict., c. 55), and was governed by that and a subsequent statute of the same Legislature, 34 Vict., c. 23. It was, therefore, in its inception a provincial railway. In 1873, however, the Parliament of Canada, by Act 36 Vict., c. 82, declared this railway to be a Federal enterprise, and by a subsequent statute (38 Vict., c. 68) changed the name of the Company to that which it bears on this record. Hence, when the proceedings which resulted in the award in question were commenced, the railway had become a Federal railway, and the respondent company was subject to and governed by the provisions of the Canadian statute known as "The Railway Act, 1868."

It appears that, in one or other of the above two states of existence, this company had proceeded in the usual way to ascertain the compensation payable to the lessor, Mrs. Smith, in respect of her freehold interest in the land to be expropriated. The appellants intervened, and sought to have the sum payable to them for compensation in respect of their interest as lessees ascertained by the same proceeding. The Company declined to accede to this, and having settled the amount of compensation payable to Mrs. Smith, took possession of the quarry. The appellants upon that instituted certain proceedings, in order to compel the Company to ascertain the compensation due to them; those proceedings were ultimately successful, and thereupon the Company gave the notice of the 22nd of February, 1875, which was the foundation of the proceedings that resulted in the award. Their Lordships think it right here to observe that, in their opinion, there is nothing exceptional in that notice, nothing which supports the suggestion that its terms were varied by reason of the Company having previously, and perhaps wrongfully, taken possession of the quarry. It appears to them to be the usual notice contemplated by "the Railway Act of 1868." The words which have been so much relied on as authorising the arbitrators to settle all questions between the parties have been taken *verbatim et literatim* from the 10th sub-section of the 9th section of that Statute. After the service of the notice, arbitrators were appointed and the award in question was made, and the only two documents besides the notice which seem to be in any way material for the decision of the question now to be determined are, the award itself, which is at page 12, and the claim of the appellants, which is at page 20 of the record.

The material passage in the award, upon which the whole question turns, is that whereby the arbitrators, after stating that they had proceeded to assess the compensation to be paid by the Company to the appellants for the piece of land described, and for all the damages resulting from the taking possession of the same, and had visited the said piece of land, and estimated with care and established the value of it, and the amount of the said damages, proceeded to award—

"The sum of $35,013, *plus* $100 per month from this date, payable on the first of each month, until the said Company shall have set free the watercourse serving to drain the quarries adjacent to the expropriated land, and constructed a culvert to protect the said watercourse, as being the amount of compensation to be paid by the said Montreal Northern Colonization Railway Company, now

called 'the Montreal, Ottawa, and Western Railway Company,' to the said 'Bourgoin et Fils' and Bourgoin and La Montagne for the said piece of land, and for all the damages resulting from the possession of the same."

The objection taken to the award is now confined to that portion of the passage just quoted, which includes and follows the word "plus," and relates to what the arbitrators seem to have considered as wholly or in part the compensation due to the appellants in respect of that portion of their claim which was comprehended in the words of its 4th head, and claimed damages for the watercourse diverted by the Company, and for pumping and work to be done at the rate of $600 per annum for eight years (which they treated as the probable duration of their lease), and amounting to a gross sum of $4,800. Their Lordships, after full consideration of this case, and of the learned arguments upon it, have come to the conclusion that, in respect of the passage in question, the award is bad upon the face of it. The case of the appellants was very ingeniously put, particularly by Mr. Fullarton. His argument was to this effect. He said that the arbitrators probably conceived that, if they gave the full sum claimed on the assumption that the interruption of the drainage would last for the whole duration of lease, fixed at eight years, they might be doing great injustice to the Company; that by virtue of the 6th sub-section of the 7th section of "the Railway Act, 1868," which is in these words:—

"To construct, maintain, and work the railway across, along, or upon any stream of water, watercourse, canal, highway, or railway which it intersects or touches; but the stream, watercourse, highway, canal, or railway so intersected or touched shall be restored by the Company to its former state, or to such a state as not to impair its usefulness."

The Company was, to the knowledge of the arbitrators, under a statutory obligation to restore the watercourse; that they assumed that the Company would perform that statutory obligation as soon as possible; and accordingly assessed the damages in the manner complained of in case and for the supposed benefit of the Company; and further, that it was competent to them so to do.

The motives of the arbitrators, whatever they may have been, cannot validate their act if that were *ultra vires*. And the first observation which their Lordships have to make is that, as they read the statute, it was not competent to the arbitrators to impose the payment of a rent or periodical sum at all. The word "rent," no doubt, occurs in several of the sub-sections of section 9; but their Lordships think that the use of that word is always to be explained by reference to the provisions contained in the sub-sections 3, 4, and 8, and that in every case, except those in which the parties expropriated fall within the description of "corporations or persons who cannot in common course of law sell or alienate the lands set out and ascertained," it is the duty of the arbitrators to fix as compensation, such a gross sum or sums as would be capable of being paid or tendered at once to the parties entitled to the same under the 27th sub-section, or into Court under the 34th sub-section, of the 9th section of the Act, in order to entitle the Company to possession under the 27th, or to a confirmation of title under the 34th and 35th sub-sections. It appears, moreover, to their lordships, that even if a rentcharge could be given by way of compensation in circumstances like these to the expropriated parties, it has not been done in

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this case; that the monthly sum awarded is not, in any sense of the term, a rent; that it is more in the nature of an assessment of damages payable *in futuro*, and does not in any point of view fall within the provisions of the Act.

A further objection to this part of the award is, that it makes the monthly payment contingent on the completion and erection of certain works, and thus introduces an element of uncertainty which would of itself be a fatal objection to the award. That it is open to the objection of uncertainty is shown by the observations which have been quoted from the judgment of Mr. Justice Tessier, who decided in favour of the appellants. The learned Judge, p. 403, line 20, assumes that if the culvert is not constructed the annual sum will continue to be payable, not only to the appellants and their assigns, but to the reversioner, Mrs. Smith. The learned Counsel for the appellants repudiated that construction; but the fact that it was put by the learned Judge upon the document goes to prove that there is some degree of uncertainty in the award. Again, the duration of the appellant's interest is uncertain, in that they held their lease with the power of renewing it so long as any stone remained to be worked. They might thus prolong the time during which the monthly sum would be payable, by omitting to work the stone, although no doubt the Company would have the power to put an end to their liability by doing the works prescribed.

Lastly, there seems to their lordships to be a fatal objection to the award in the direction to the Company to restore the water course in a particular manner, and that by the construction of a culvert. They conceive that it was not within the functions of the arbitrators to prescribe how the Company was to relieve itself from the statutory obligation imposed upon it by the 6th sub-section of the 7th section, or to cast upon them the construction of a culvert which possibly might not be necessary.

It is right now to notice shortly certain authorities which have been invoked in the course of the arguments at the bar. The Chief Justice referred to four cases reported in the 12th Queen's Bench reports, Upper Canada, as supporting his judgment, whereas the learned counsel for the appellants has treated them as authorities in his favour. If those decisions are opposed to the decision of the Court of Queen's Bench of Quebec in this case, that would only show that there is a conflict of authority between the highest courts of the two provinces, and that it is for their lordships to decide between them. But their lordships think that in truth there is no conflict at all, and that the cases in question do go to support the judgment of the Chief Justice in this case. It is to be observed that in all four cases the award was set aside. There is, therefore, no affirmative decision that a clause of this kind in an award is good. The only passage in the judgments in question which seems to their lordships capable of being treated as in favour of the appellants is that at page 114 of the volume, in the case of the *Great Western Company vs. Baby*, Chief Justice Robinson there says:—

"The second and third objections seem also to have been satisfactorily answered. It is not the devisees who are moving against the award, on the ground that some things are directed in their favour which cannot be enforced against the Company; it is the Company who are complaining of the extravagance of the

award. If they choose to object against the making and maintaining the tank spoken of, and to keeping open the Ferry street, and can successfully resist both or either of them, that would only show that, so far as the amount of the award can have been influenced by assuming that those things were to be done, the devisees may have reason to complain that they have been deluded by promises of advantages which cannot be secured to them, and that the sum awarded as the value of their property should therefore have been larger, as they cannot reckon upon enjoying these benefits, which the arbitrators may have taken into account as considerations in their favour, tending to diminish the sum to be awarded."

He goes on to say,—

"Besides, these are not things which the arbitrators have taken upon themselves to direct. They seem rather to have inserted them as being things understood between the parties, and which they had therefore taken into consideration in estimating the damages."

Then, at page 121, after saying that the award must be annulled upon another ground, he says,—

"But, to avoid occasion for question upon any future award, we would suggest that it should be clearly expressed, in the first place, that the sum awarded is given for the value of the lands and tenements or private privileges proposed to be purchased, or for the amount of damages which the claimant is entitled to receive in consequence of the intended railroad in and upon his lands (as the case may be), and that the award should either be silent in regard to any other matter on which the statute gives no authority to the arbitrators to give a direction, or that, if the estimate has been influenced by anything which the Company has engaged to do in order to lessen the inconvenience, it should be plainly expressed that the Company have undertaken to do it, and the particular thing should be so defined as to leave no uncertainty, and no room for future litigation as to what is to be done or allowed by the Company, and at what particular part in their work and in what manner it is to be done."

Therefore this judgment proceeded upon the fact that the Company had agreed and offered to do certain things, not that the arbitrators had imposed upon this Company the obligation to do them, and it points out that the award would be more correctly drawn if it had taken no notice at all of the works in question, or had stated that the Company had voluntarily undertaken to perform them. It gives no countenance to the doctrine that it is competent to arbitrators to impose such an obligation as of their own authority.

Again, the case cited from Sirey's collection seems to be distinguishable from the present in the manner in which Chief Justice Dorion has pointed out. There a gross sum was awarded, but that gross sum was made reducible if the Company should do something which, as in that Canadian case, they had undertaken to do. The case is certainly distinguishable from the present, both because the compensation awarded was one sum payable at once, and because the Company had undertaken to do the works in question. Several other French decisions have been cited by Mr. Justice Tessier in support of his view of this award, but it appears to their lordships impossible to reconcile the broad principle which he seems to deduce from them, viz., that objections of this kind can only be taken

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by the person expropriated, and not by the body that expropriates, with the Railway Act of 1868 and its provisions. Their lordships think that this case ought to be decided upon Canadian legislation and upon Canadian jurisprudence. For that reason they do not notice the case from the Isle of Man, which was cited by Mr. Benjamin.

The only remaining question to be considered is one which was suggested in the course of the argument, viz., whether the objectionable part of the award is severable from that which awards to the appellant the sum of $35,013, so that the appellants may recover that, waiving their right to the rest of the compensation awarded. The point was never taken in the Canadian Courts, no offer of waiver was made there, and it may be questionable whether that point can now, for the first time, be raised here. Assuming, however, that it is open to the appellants, their lordships are of opinion that the award is not severable in the manner suggested, the compensation improperly awarded being combined as it is with that which was properly awarded, and both declared to be "le montant "de la compensation à être payée, pour le dit morceau de terre, et pour tous "les dommages résultant de la possession d'icelui." And if they were severed a question might arise, as Mr. Benjamin has argued, whether the award would not be defective in that it failed to deal fully with one of the questions submitted to the arbitrators, viz., the amount of compensation due to the appellants under the fourth head of their claim.

This being their lordships' view, they think that the decision of the Court of Queen's Bench, which annulled and set aside the award as invalid on the face of it, is correct. They have come to that conclusion with considerable regret, because they feel that the appellants were entitled to a fair compensation for the expropriation of their quarry, and that now, after a vast amount of expensive litigation, they are as far as ever from receiving that compensation. Their lordships do not say that the fault is wholly that of the Company or wholly that of the appellants; but the lamentable result remains, and they can only express their hope that in some way or another means will be found to give the appellants a fair compensation for the expropriation of their quarry, and for the damages which they have sustained thereby. Their lordships, however, can but decide this question on its legal merits, and they feel that it is of great importance that arbitrators, with the large power given to them by "The Railway Act, 1868," should be kept within the limits of their authority.

The conclusion to which their lordships have come seems to dispose, not only of the first appeal, but of most of the other questions raised on the record.

Mr. Doutre, Q.C., then intimated that, after consultation, the Counsel for the appellants had come to the conclusion that even if the award were pronounced to be bad, that could affect only two of the appeals, and that they were desirous to argue the two other appeals. After some discussion their Lordships assented to the adoption of this course. Those appeals were accordingly argued, and on the 26th day of February their Lordships* delivered the following judgment upon them:—

* Sir Robert P. Collier was not present.

The judgment of their Lordships, which was delivered on the 14th instant, and ruled that the award of the 28th of July, 1876, was bad on the face of it, disposed, except as to costs, of the appeals numbered 13 and 144 respectively, and of all the questions on this record between the appellants and the respondent Company.

It seemed, moreover, to leave to the appellants no substantial interest, other than costs, in the rest of the litigation. Their Counsel, however, expressed a desire to argue the remaining appeals (Nos. 117 and 141), and satisfied their Lordships that they were entitled to do so. Those appeals have accordingly been heard, and their Lordships have now to give judgment upon them. In order to see clearly what are the questions raised by them, it is necessary to refer shortly to some of the proceedings in the two actions numbered respectively in the Superior Court 693 and 1,213.

In the latter of these, which was brought by the appellants against the Company in December, 1874, in order to recover the amount due on the award, the respondent, the Attorney General, intervened in the month of February, 1878. The cause was heard on the 18th of April, 1878, by Mr. Justice Mackay in the Superior Court against both the Company, the defendants, and the Attorney General as intervenor, and the judgment of that Court dismissed the intervention, and condemned the Company to pay to the appellants the amount due on the award. From this judgment the Company and the Attorney General appealed separately. The Court of Queen's Bench reversed the judgment of the Superior Court against the Company, and the appeal of the appellants against so much of their judgment (No. 144) has already been disposed of. The appeal of the Attorney General was also allowed, and the judgment of the Superior Court reversed as against him, but on the ground that the intervention, though legally competent, was unnecessary, without costs. Hence the appeal No. 117.

Again, the Superior Court, by its judgment in Suit No. 693, wherein the Company sued to set aside the award, dismissed that suit with costs. The Company appealed against that judgment, and has succeeded both in the Court of Queen's Bench and here in getting it reversed. The date, however, of the judgment of the Superior Court was the 30th of April, 1877; the appeal against it was not lodged until the 5th of October following, and intermediately, *i.e.*, on the 22nd May in that year, the appellants issued a writ of execution for their costs, under which the sheriff seized certain lands, rolling stock, and other property as belonging to the Company. On the 17th January, 1878, the Attorney General filed an "opposition à fin de distraire," by which he claimed the whole of the property seized as the property of the Queen for the use of the Province of Quebec. The appellants filed their contestation, and on the 31st May, 1878, Mr. Justice Johnson pronounced the judgment of the Superior Court, which upheld the opposition; declared that all the lands seized were the property of Her Majesty for the use of the Province of Quebec; that accordingly the seizure of the lands, immoveables, and accessories in question was null, void, and illegal, and granted main levée thereof to the opposant, with costs against the contestants, the present appellants. That judgment was, on

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appeal, confirmed by the Court of Queen's Bench, and hence the appeal No. 141.

The determination of both these appeals mainly depends on the effect to be given to the transaction between the Company and the Government of Quebec which is embodied in the Notarial Act or Deed of the 16th of November, 1875, and in Act 39 Vict., c. 2, of the Legislature of Quebec. The parties to the Deed are stated to be Her Majesty the Queen, represented by the Secretary of the Province of Quebec, "acting as well for and on behalf of Her Majesty as for "and on behalf of the Province of Quebec, party hereto of the first part, hereinafter called 'the Government,' and the Montreal, Ottawa, and Western Railway Company, described as a body politic and corporate, duly incorporated by "statutes of the Province of Quebec and of the Dominion of Canada, &c., "party hereto of the second part, hereinafter called 'the Company.'" The deed, after reciting the nature of the enterprise and the commencement of the work, and that the Company was then unable to proceed further with the construction of the railway by reason of certain bonds not being negotiated; and that the Government was willing to assume and complete the construction of the said railway upon such terms and conditions, and in such manner and within such time as the Government might deem expedient, and for that purpose to acquire from the said Company all its rights and assets, and to take upon itself the legitimate liabilities of the Company, and to repay the disbursements of the Company in manner and form and to the extent thereinafter described; and that in consideration thereof the Company had agreed to transfer and convey such rights and assets to the Government also upon the conditions thereinafter expressed—proceeds to state, in different clauses, the covenants and agreements into which the parties had entered before the notary. The material clauses are the 1st, 2nd, 4th, 7th, 8th, and 9th.

By the 1st, the Company granted, sold, and conveyed to the Government all its right, title, and interest in the uncompleted railway, with all lands acquired or bonded for right of way, stations, and other purposes, all bridges, piers, abutments, forms, and other things expressly mentioned, stating their intention to be "to divest the Company of all the property of the said corporation, and "of all and every part and parcel of the said incomplete railway, and of every-"thing appertaining thereto or necessary or useful or acquired for the construc-"tion thereof, now in the possession of the Company, or to which it is entitled, "as fully and completely to all intents and purposes as the same are now held "by the Company, and to vest the same in the Government."

By the 2nd, the Company transferred to the Government all its right, title, and interest in and to the balance of the subscription of stock in the said Company by the Corporation of the city of Montreal, and the several subscriptions of stock in the said Company of various other corporations, together with all the rights, claims, and demands of the said Company upon the said city of Montreal for the said balance of subscriptions, and upon the said other corporations for their said subscriptions of stock and bonus.

By the 4th, the Government, in consideration of the above sales and transfers, agreed to pay to certain trustees for the Company, upon the confirmation of the

deed, the sum of $57,149.95 currency, being the amount of the then paid up capital of the Company; and also to pay immediately all such disbursements and liabilities as had been adjusted between the Government and the Company; and it was further agreed that if any further legitimate liabilities should be established to the satisfaction of the Government to be justly and legally due by the Company, the same should also be assumed and paid by the Government.

By the 7th, it was provided that, until it should please the Government to receive possession of the property and premises thereby transferred, the Company should hold and administer the same for and on behalf of the Government, and in such manner as should be directed by it, and should, in all respects, carry out the instructions of the Government in respect of the said railway: and in respect of every matter and thing connected therewith, until the transfer and delivery thereof to the Government and its complete assumption and possession thereof had been perfected: and that, so soon as such transfer and delivery should have been so perfected, the Company should dissolve itself, and should cease to act in any way, the Government thereupon indicating some person to accept transfers of the shares of the Company held by the individual shareholders therein.

By the 8th, the Company undertook to assist the Government, in any manner that might be required, in procuring the passage of any Act by the Dominion or the Provincial Parliament that the Government might deem expedient to have passed in the interest of the enterprise, and to furnish aid and assistance in other matters.

And, by the 9th, it was provided that the deed should have no force or effect after the termination of the next Session of the Legislature of the Province of Quebec, unless confirmed by the said Legislature at the next Session thereof, nor until such confirmation; but that it should be submitted for such confirmation to the next Session of the said Legislature, and, immediately upon such confirmation, should have full force and effect according to its terms.

The confirmation required by this last clause of the deed was given by the Act 39 Vict. c. 2, which was passed by the Legislature of Quebec on the 24th December, 1875. That Statute not only, by its 8th Section, confirmed in the fullest manner the transfer and assignment of the 2nd November, 1875, it did a great deal more: it combined the enterprise of the Montreal, Ottawa, and Western Railway Company with that of another Company called the North Shore Railway Company, which had made a similar transfer in favour of the Government of Quebec; it gave to the railway to be completed the new name of "The Quebec, Montreal, Ottawa and Occidental Railway"; it declared that railway to be a public work belonging to the province of Quebec, held to and for the public uses of the province, and provided for the mode of its construction; it vested the construction and management of that railway in certain Commissioners with ample and defined powers; by Section 11 it made the provisions of the Quebec Railway Act, 1869, so far as they were applicable to the undertaking and not inconsistent with the provisions of that Act, applicable to the said railway, and empowered the Commissioners, in cases where proceedings had been commenced by the Montreal, Ottawa, and Western Railway for the expropria-

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tion and acquisition of lands for the purposes of that railway and had not been completed, to continue such proceedings under the provisions of the Quebec Railway Act, but with the consent of the proprietor of such lands, or to discontinue such proceedings, and commence proceedings *de novo* under the said Quebec Railway Act; and by Section 24 it reunited lands which had been granted to the Montreal, Ottawa, and Western Railway Company, to the public lands of the Province. Sections 43, 44, 45, and 46 have even a more direct bearing upon the questions raised by the two appeals now under consideration. Section 43, in order "to avoid all doubts," enacts that the Quebec, Montreal, and Occidental Railway is thereby invested with all the rights, powers, immunities, franchises, privileges, or assets granted by the Legislature of the Province of Quebec to the Montreal Northern Colonization Railway Company, and, so far as that Legislature could do, with all the rights, powers, immunities, franchises, privileges, and assets granted by the Parliament of the Dominion of Canada to the Montreal, Ottawa, and Western Railway Company. Section 44 takes away the power of the last-mentioned Company to appoint Directors, and abolishes the Directorate contemplated by the former Statutes. Section 45 transfers to the Commissioners the rights of the individual shareholders in the Montreal, Ottawa, and Western Railway Company, providing that their paid-up stock shall be refunded to them; and Section 46 authorizes the Commissioners, with the consent of the Lieutenant Governor in Council, to apply to the Parliament of Canada for any legislation which may be deemed necessary for the purposes of the Act.

The combined effect, therefore, of the deed and of this Statute, if the transaction was valid, was to transfer a federal railway, with all its appurtenances, and all the property, liabilities, rights, and powers of the existing Company, to the Quebec Government, and, through it, to a Company with a new title and a different organization; to dissolve the old federal Company, and to substitute for it one which was to be governed by, and subject to, provincial legislation.

It is contended on the part of the appellants that this transaction was invalid, and altogether inoperative to affect the obligations of the Company. They insist that, by the general law and by reason of the special legislation which governed it, the Company was incompetent thus to dissolve itself, to abandon its undertaking, and to transfer that, and its own property, liabilities, powers, and rights to another body, without the sanction of an Act of a competent Legislature: and, further, that the Legislature of Quebec was incompetent to give such sanction. This contention appears to their Lordships to be well founded.

That such a transfer, except under the authority of an Act of Parliament, would in this country be held to be *ultra vires* of a Railway Company, appears from the judgment of Lord Cairns *in re* Gardner *v.* London, Dover, and Chatham Railway Company, 2 Chancery Appeals, 201 and 212. That it is equally repugnant to the law of the Province of Quebec, so far as that is to be gathered from the Civil Code, is shewn by the 369th Article of that Code. But the strongest ground in favour of the appellants' contention is to be found in the special legislation touching this Railway Company. The history of the Company and of its conversion from a provincial into a federal Railway Company has been stated in the judgment about to be delivered. By Section 1 of the Canadian

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Statute 36 Vict. c. 82, which effected that conversion, the railway was declared to be a work for the general advantage of Canada. By the 5th Section of the same Statute, it was enacted that the continuations of the line thereby authorised should be deemed to be railways or a railway to be constructed under the authority of a special Act passed by the Parliament of Canada, and that the Company should be deemed to be a Company incorporated for the construction and working of such railways and railway, according to the true intent and meaning of "The Railway Act, 1868" (the Dominion Statute). By the 6th Section, Parts 1st and 2nd of "The Railway Act, 1868" (which comprise all the general and material provisions of that Statute), were made applicable to the whole line of the railway, whether within or beyond the enterprise originally contemplated; and it was enacted that no part of "The Quebec Railway Act, 1869," should apply to the said railway or any part thereof, or to the said Company. And by the 7th Section it was provided that the two Acts of the Quebec Legislature (32 Vict. c. 35, and 33 Vict. c. 28), by which the Company had been incorporated and previously governed, should be read and construed and have effect as if the changes of expression therein mentioned (the effect of which would be to make them speak as Acts of the Canadian Parliament) had been made in them; that so read and construed and taking effect, they should be deemed to be special Acts according to the true intent and meaning of "The Railway Act, 1868," and that no part of "The Quebec Railway Act, 1869," should be incorporated with the said special Acts, or either of them, or form part thereof, or be construed therewith as forming one Act.

These provisions, taken in connection with, and read by the light of those of the Imperial Statute, "the British North American Act, 1867," which are contained in Section 91, and Sub-section 10 *c* of Section 92, establish, to their Lordships' satisfaction, that the transaction between the Company and the Government of Quebec could not be validated to all intents and purposes by an Act of the provincial Legislature, but that an Act of the Parliament of Canada was essential in order to give it full force and effect. This proposition was, finally, hardly disputed by the learned Counsel for the respondent, but they relied upon the 8th clause of the deed, and the 46th Section of the Quebec Act, as showing that recourse to the Parliament of Canada for its sanction was within the contemplation of the parties, and contended that, before that sanction was obtained, the transaction was valid for some purposes, and gave certain inchoate rights which were capable of being asserted. In support of their argument they [illegible] Great Western Railway Company *v.* The Birmingham and Oxford Junction Railway, 2 Phill. 597, and what was said by Lord Cottenham in that case. It is to be observed, however, that Lord Cottenham, when ruling that the contract, which could not be fully carried out without Parliamentary sanction, was not, in the absence of such sanction, to be treated as a nullity, and that some of its provisions might nevertheless be binding, was dealing with the rights of the parties to the contract *inter se*. Here the public, and the creditors of the Company, in which category the appellants fell, since the questions raised by these two appeals must be considered as if the award were valid, were no parties to the transaction, and could not be affected by it until it was fully

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validated by an Act of the Parliament of Canada, to obtain which no attempt seems ever to have been made. In their Lordships' opinion, therefore, the transaction, considered as a whole, was of no force or validity as against the rights of the appellants when the decisions of the Canadian Courts upon the intervention and the opposition were passed.

This being their Lordships' conclusion, they proceed to consider how it affects the two appeals, and first that which relates to the Attorney General's intervention. Now, if it be admitted, for the sake of argument, though their Lordships must not be taken to affirm the proposition, that the Attorney General had such an inchoate right under the transaction as would have justified his intervention had there been reason to suppose that the expiring Company would fail to make a substantial defence to the action No. 1,213, it is to be observed that that was not the actual state of things. The action itself was not commenced until December, 1876, and the defences of the Company were filed on the 30th of that month. The transaction between the Company and the Quebec Government was completed, so far as it was ever completed, in December, 1875. It is, therefore, obvious that, in the first instance, the Quebec Government intended to defend the action, in the name of the Company, under the provisions of the 7th clause of the deed. All objections which the Company could take to the award, and in particular the one which has proved fatal to it, were taken in their defences. The intervention of the Attorney General was not until 1878, and the reasons filed by him on the 17th of September in that year are sufficient to show that the object of the intervention was to raise objections to the validity of the award, founded upon the attempted transfer of 1875, which could not have been taken in the name of the Company. Those reasons, the contestation of them, and the other pleadings show that the new issues raised between the parties were the validity of the transfers as against the appellants, the right of the Commissioners under the Quebec Act to continue or discontinue the proceedings in the expropriation, the abandonment of the Railway, and its transformation into a new railway, to be constructed under different conditions. This intervention was only necessary for the trial of these fresh and additional issues; and was, as the Court of Queen's Bench itself has found, wholly unnecessary for the trial of the original issues. Upon the trial of the action in the Superior Court, Mr. Justice Mackay expressly found "que les faits allégués dans la dite interven-"tion, savoir le transport des droits et actions de la dite défenderesse au Gou-"vernement de la dite Province de Québec, n'a pas été prouvé avoir lieu légale-"ment," a finding in accordance with the conclusion to which their Lordships have come touching the transaction of 1875, and one which would justify the dismissal of the intervention, even if the learned Judge had taken a view different from that which he did take of the validity of the award. The Attorney General had failed to show any grounds for inflicting upon the appellants the costs of unnecessary and expensive proceedings. In these circumstances, their Lordships are of opinion that the Court of Queen's Bench ought to have dismissed the appeal of the Attorney General, and to have affirmed the judgment of the Superior Court, in so far as it related to the intervention, with costs.

Their Lordships have now to consider Appeal No. 144, which arises out of

the "opposition à fin de distraire." That opposition to the execution could not succeed as to such of the lands seized as had belonged to the Company, unless it were established that the property in those lands had been changed by the attempted transfer of 1875. Their Lordships are of opinion that there was no such change of property. The transaction, viewed as a whole, and as one single contract, could not, for the reasons above stated, operate as a valid transfer of the lands of the Company to the Government of Quebec. Their Lordships feel bound to dissent from two propositions, on one of which the judgment of Mr. Justice Johnson, and on the other of which the judgment of Chief Justice Dorion, in part proceeds. Mr. Justice Johnson ruled that the contestants ought, if they questioned the validity of the transaction of 1875, to have concluded that it should be set aside or declared null, and that, by reason of their failure to do so, they must be taken to be bound by it. Chief Justice Dorion expressed an opinion that it was only at the instance of the Government of Canada (the Dominion), or of an individual who could show that he had a special interest distinct from that of the public, that the transfer could be set aside. These reasons are somewhat contradictory, and their Lordships cannot think that either affords a good ground for the judgment impeached. If the transaction, not having the sanction of the Parliament of Canada, were *ultra vires* of the Company and the Government and Legislature of Quebec, it was of no legal force or validity against the appellants, and might be so treated by them whether it were formally set aside or not. The other ground on which the judgment proceeds, and which has been chiefly insisted upon here, is more plausible. It is that the Company had power, under the second Sub-section of the 7th Section of "The Railway Act, 1868," to "alienate, sell, and dispose of its lands;" that the transaction of 1875, even if invalid as a whole, is severable, and that the Company must be taken to have sold by it their land to the Government of Quebec in the exercise of that power. Their Lordships cannot accede to this argument. It appears to them that the contract is not severable in the manner suggested. It is a contract whereby, for the same consideration, everything which it purported to pass was intended to pass. Suppose what was suggested by Chief Justice Dorion were really to happen, that the Dominion Government were to take steps to set aside the transaction, could the Government of Quebec be heard to say, "True, the transaction will not stand as a "transfer of the railway, or of the rights, powers, liabilities, and duties of the "Company, but it may enure as a sale of the lands acquired in order to the "construction of the railway, or part of them, in the exercise of the power in "question." Would not the answer be, "There is no trace of such a contract, "or of an intention to make it?"

By the evidence taken on this proceeding, it appeared that a considerable part of the lands, rolling stock, and other property seized, had never belonged to the Company, but had been purchased by the Commissioners since 1875.

In respect of that property, the Attorney General was entitled to succeed in his opposition. He should, however, have been held to have failed as to the lands, &c., which had belonged to the Company. And in their Lordships' opinion, the proper order to be made was one which would have upheld the seizure

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as to this latter part of the property in question, whilst it granted main levée as to the rest, leaving each party to pay their own costs. Since the execution must now altogether fail by reason of the award having been set aside, it will not be necessary to draw up a formal order to the above effect.

The order which their Lordships will humbly recommend Her Majesty to make on the four consolidated appeals will be to the following effect, viz., to dismiss the appeals numbered respectively 13 and 144, and to allow those numbered respectively 117 and 141; to affirm the judgment of the Court of Queen's Bench (Record 180) in the suit No. 693, wherein the Company was plaintiff, and the appellants and others were defendants: to reverse so much of the judgment of the Court of Queen's Bench (Record 286) in the action 1213, wherein the appellants were plaintiffs, and the Company were defendants, and the Attorney General intervenor, as relates to the intervention of the Attorney General, and in lieu thereof to affirm so much of the judgment of the Superior Court in the same suit as relates to such intervention, with the costs of the appeal to the Queen's Bench; but to affirm in all other respects the last-mentioned judgment of the Court of Queen's Bench; to reverse the judgment of the Court of Queen's Bench in the matter of the "opposition à fin de distraire," and to declare that in lieu thereof, an order should have been made reversing the judgment of the Superior Court in such matter, and declaring that the opposition should have been allowed as to so much only of the property seized as had been purchased by the Commissioners since 1875, and disallowed as to the rest, and that each party should bear their own costs in both Courts, but that by reason of the failure of the execution in consequence of the setting aside of the award, it had become unnecessary to draw up any such order.

Their Lordships are of opinion that, under the circumstances, no order should be made as to the costs of these consolidated appeals.

(E. Lef. de B.)

COURT OF REVIEW, 1879.

MONTREAL, 29TH DECEMBER, 1879.

Coram SICOTTE, J., MACKAY, J., TORRANCE, J.

No. 2249.

Laferrière vs. *The Mutual Fire Ins. Co. of The County of Berthier.*

HELD:—That the deposit required on every inscription in Review cannot be dispensed with by consent of parties.

MACKAY, J.—In this case there has not been any deposit such as the law requires on every inscription in Review, and this by the consent of the parties in this cause. The Court considers that such a consent is invalid, and we, therefore, order the record to be remitted to the Court below in order that the proper deposit may be made. In future, in any like case, the Court will discharge the inscription.

Record remitted to Court below.

M. Mathieu, for the plaintiff.
A. Germain, for the defendant.

(S. B.)

COUR DE CIRCUIT, 1880.

MONTREAL, 20 FEVRIER 1880.

No. 9387.

Coram TORRANCE, J.

Thomas Owens et al. vs. *Edmond Laflamme*, et *Rose D. Charest*, oppt.

JUGE :—Qu'en vertu de l'article 176 C. C. une femme séparée de biens peut ester en jugement et former opposition à la vente de ses effets mobiliers, sous saisie, sans l'autorisation ou l'assistance de son mari.

L'opposante étant séparée de biens fit opposition à la vente de ses effets mobiliers, saisis en vertu d'un bref d'exécution émané contre le défendeur, son mari.

Les demandeurs prétendirent que cette opposition était irrégulière et illégale, et demandèrent par motion qu'elle fut rejetée, parceque l'opposante était sous puissance de mari, et que son mari n'était pas en cause pour l'assister, et que l'opposante n'alléguait aucune autorisation à ester en jugement.

Son Honneur le Juge Torrance renvoya cette motion parceque l'opposante, en réclamant la propriété des effets mobiliers saisis en cette cause, et en demandant main-levée de la saisie, n'a fait qu'un acte de simple administration, et que dans ce cas la femme séparée de biens " peut ester en jugement sans l'autorisation ou l'assistance de son mari." Article 176 C. C.

Davidson & Cushing, avocats des demandeurs.

Desjardins & Lafontaine, avocats de l'opposante.

(P. E. L.)

[Ce jugement est conforme aux principes et à la jurisprudence. L'article 224 de la Coutume de Paris reconnait à la femme séparée de biens le droit et le pouvoir d'ester en jugement. " Femme ne peut ester en jugement sans le consentement de son mari, si elle n'est autorisée *ou séparée par justice.*" (Article 224 Coutume de Paris.)

Pothier commentant cet article dans son Traité de la puissance maritale, No. 60 : " La " Coutume de Paris en l'article ci-dessus, dit-il, fait une seconde exception à l'égard des fem- " mes, par ces termes, *ou séparée* par justice et la dite séparation exécutée." Ce pouvoir que " la Coutume donne aux femmes séparées d'ester en jugement sans l'assistance de leur maris, " étant une suite du pouvoir que la séparation leur donne d'administrer leurs biens, sans " avoir besoin pour cela de leurs maris, il est évident que cette exception pour les femmes " séparées ne doit s'entendre que des actions qui concernent l'administration de leurs biens, " qu'elles peuvent intenter et auxquelles elles peuvent défendre sans leurs maris."

Ce sont ces principes qui ont guidé les Hon. Juges Bacquet et Duval dans la cause de Cary vs. Ryland et Gore opposante (3 L. C. J. p. 132) et ils ont jugé : " Que la femme " séparée quant aux biens contractuellement peut ester en jugement sans l'assistance, ni " l'autorisation de son mari, pour la conservation de ses mobiliers."

Quant à la cause de Blumhart vs. Boulé et Archambault, (1 L. C.L.J. 63) il appert par les régistres de la Cour Supérieure qu'il s'agissait de la propriété de certains immeubles saisis sur le défendeur. Le jugement a été rendu pour le motif suivant. " Considérant que la " dite opposante n'a pas été autorisée pour ester en jugement en cette cause ayant trait " et concernant les biens fonds et immeubles saisis en cette cause, et la propriété en iceux " de la dite opposante, maintient la dite contestation et déboute l'opposition," etc.—*Note du rapporteur.*]

COURT OF REVIEW, 1879.

MONTREAL, 29TH DECEMBER, 1879.

Coram SICOTTE, J., MACKAY, J., TORRANCE, J.

No. 879.

Miller vs. *Daudelin*.

HELD:—That where a vendor of a colt takes, in payment of the purchase money, the note of a third party, unendorsed or otherwise guaranteed in writing by the purchaser, but which the purchaser (knowing the same to be worthless) represents to the vendor to be "as good as gold," and which proves to be really worthless in consequence of the insolvency of the parties thereto, the vendor may tender the note back and sue simply for the purchase money, without demanding the rescision of the sale.

The facts of the case and the questions of law raised therein are fully detailed in the following remarks of counsel:—

Bethune, Q.C., for plaintiff:—

This is an action brought by a vendor against a purchaser for the price of a colt sold and delivered, and it arises from the following facts as set forth in plaintiff's declaration:—

In the month of August, 1875, at Dunham, defendant requested plaintiff to sell him the colt in question; that the price therefor, $100, was agreed upon between them. That defendant being the holder of a promissory note not then due, made by W. A. Osgood and R. M. Hall in favor of H. M. Welch or bearer, for the payment of $100, offered the same in payment of said price to plaintiff; that plaintiff refused to take this note, and persisted in his refusal until he was assured by defendant that the same was, to use the words of the defendant, "as good as gold." That relying upon this assurance plaintiff took this note. That the note is worthless, and was offered back to defendant, and is deposited in Court. Wherefore plaintiff sought to have defendant condemned to the payment of said price.

To this action defendant filed a plea substantially setting forth that the transaction in question was an exchange of the note against the colt, and that the defendant transferred the note to plaintiff without giving any guaranty thereon, and further that in any event plaintiff could only obtain a rescision of the contract and recover the colt. Then followed a *défense au fond en fait*.

The evidence established the allegations of plaintiff's declaration, and that it was a sale and not an exchange, and that beyond question, when plaintiff sold the colt to defendant, the defendant unequivocally stated that the note was as good as gold. The insolvency and worthlessness of the makers and payee of the note are also established, and *d'abondant* that it would have been a mere waste of money to have caused the note to have been protested.

On the part of defendant the bulk of his evidence is brought for the purpose of attacking the credibility of one Boulet, a witness of plaintiff. The remaining proof is from Pierre Daudelin, (the father of defendant), who in cross-examination corroborates the testimony of some of plaintiff's witnesses, and admits the worthlessness of the note by having refused himself to accept of it.

Upon the facts as presented by the evidence in his case the action of plaintiff

was dismissed by the Hon. Mr. Justice Dunkin; the *motifs* of that judgment being as follows:—

"Considering that the plaintiff herein sues not for rescinding of the entire contract set forth in his declaration on the ground of the alleged false representations made by the defendant to himself in respect thereof, but purely for the recovery of the amount of the promissory note in such declaration set forth, by reason of which alleged false representations as touching the same; that the said defendant is shewn to have made over such note without any endorsement thereof by himself as *aval* or otherwise, and that it is not shown in evidence in so making over such note he made any agreement or representation such as can in law entitle the plaintiff to recover the amount thereof from the defendant, as he here seeks to do, doth dismiss, &c."

The plaintiff respectfully contends that this judgment is erroneous and should be reversed. This action is not brought on the note, as stated in the judgment, but is brought for the recovery of the debt in respect to which the note was transferred. The defendant received the thing sold to him and he has not paid for it, and there is no evidence to shew that plaintiff took the note at his own risk, but, on the contrary, there is conclusive evidence to shew that it was taken solely upon the false representations of defendant. And that it was competent to the plaintiff to bring such an action is conclusively shewn by Chitty in his work on Bills, Part 1, ch. 5 and 6, pages 180, 243 and 244 (original paging).

The plaintiff contends that the defendant is in the same position as if he had given to plaintiff a spurious bank bill for the payment of the price, in which case he would have been compellable to make good the amount.

The debt existing, there was no novation of it by the taking of the promissory note, and the representations as to its value proving false, the recourse of the plaintiff was for the recovery of the debt for which it was transferred.

Admitting, for the sake of argument, that upon the facts of the case the plaintiff might have brought an action to rescind the sale, it is contended that that would not exclude the remedy of the plaintiff for the price, and therefore the contention (and the sole contention it may be said) of the judgment, that plaintiff's recourse was in recision, is erroneous.

It has been held over and over again that in such a case as the present the plaintiff might maintain either *assumpsit* in affirming the contract, or trover in disaffirming it.

We find it laid down in Benjamin on Sales, p. 342, as follows: "By the rules established in these cases (certain reported cases in the Privy Council and the House of Lords), wherever goods are obtained from their owner by fraud we must distinguish whether the facts show a sale to the party guilty of the fraud, or a mere delivery of the goods into his possession induced by fraudulent devices on his part. In other words we must ask whether the owner intended to transfer both the property in and the possession of the goods to the person guilty of the fraud.

In the former case there is a contract of sale however fraudulent the devices, and the property passes, but not in the latter case. The contract is voidable at

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the election of the vendor, not void *ab initio*. It follows, therefore, that the vendor may affirm and enforce it. He may sue in *assumpsit* for the price, and this affirms the contract; or he may sue in trover for the goods or their value, and this disaffirms it."

See also Hilliard on Sales, cap. XIII, s. 5, p. 172, and cases therein cited.

See also Baker vs. Robbins, 2 Denio, 136, where it was held that "a party who upon the sale of goods receives from the purchaser a promissory note made by a third person in payment, and afterwards sues the purchaser for goods sold, on account of fraudulent representations made by him as to the solvency of the maker by which he was induced to receive the note, must, in order to recover, shew that he returned or tendered the note to the defendant before suit brought. Also Martin vs. Roberts, Cushing's Reports (Mass.), 5 Vol. p. 126; held, that where the vendor of an article received in payment thereof a promissory note of a third person falsely and fraudulently represented by the vendee to be solvent, together with an order on a third person for goods, which was duly paid, and the vendor returned the note to the vendee on discovery of the fraud, that the vendor might maintain an action of *assumpsit* to recover the price of the article sold, deducting therefrom the amount of the order, without returning the latter.

By the Court:—The principle upon which the right of the plaintiff to recover rests is a very clear one and will entitle him to retain his verdict. The supposed payment has proved delusive.

The vendor received in payment an article of no value, and this through the fraudulent representation of the defendant. He may demand that this loss may be made good to him;—Puckford vs. Maxwell, 6 L. R. 52; Young vs. Adams, 6 Mass. 182, and the cases there cited.

See also Steadman vs. Gooch, 1 Espinasse Reports, p. 3; Story on Promissory Notes, 7th Edition (1878), sec. 104; Bayley on Bills, cap. 9, p. 370; 2 Pardessus (Droit Comm.), No. 273; Bedarride (Achats et ventes), Nos. 45 to 48; DeVilleneuve & Massé, Dict. du Cont. Comm. Vo. Vente, p. 691, No. 292; Richard vs. Boisvert, 3rd. Rev. Leg. 7.

In order to anticipate any objection that may be raised on the score that the note was not protested, it may be stated that the uselessness of that proceeding is established by evidence of record, and there is the additional fact that, the note being payable to bearer, no protest was necessary to hold Welch as *Aval*.

E. Racicot, for defendant, submitted the following propositions:—

Firstly, a careful examination of the evidence will convince the Court that it was a contract of exchange which took place between plaintiff and defendant. Plaintiff took the note and defendant took the colt; defendant was willing to call the colt worth $100, if plaintiff consented to take the note (which in July, 1875, amounted with interest to $103) as being equal to $100. Such being the fact, what was the plaintiff's remedy if he pretended that the defendant cheated him by false representations, by practising fraud and artifice, *dol*, to induce him to trade? Our law is clear upon the point: Arts. 991, 993, 1,000 of our Civil Code (which merely reproduce the old French law), teach us what fraud is, and that *it gives a right of action to annul or rescind the contract.* The defendant thinks, therefore, that even if the fraud were proved in this case,

the condemnation cannot be for a sum of money, and to compel him to take the note back, but the action should have been to rescind the contract and to compel defendant to give back the colt or pay its value in return for the note, *to change back;* Story on Sales, 427, and foot note.

Neither party can rescind a contract without replacing the other in the same position in respect to the goods as he occupied before the delivery of the article, nor without rescinding *in toto*.

This was one of the grounds of the dismissal of the action in *re Lewis et al. & Jeffrey et al.*, reported in the 18th Jurist, page 132. In fact, if the plaintiff's pretensions were sustained, if the contract were held good so far as his property is concerned, and he were to reap the benefit of a value or price which may have been put on his colt for the sake of the exchange, while defendant was deprived of the benefit of the contract, the advantage would all be on one side, and it would be most unfair to the defendant.

Secondly. Closely allied to the question of rescision itself is the *time* when the plaintiff should proceed, the *diligence* which he should exercise. The plaintiff could easily have obtained reliable information as to the standing, pecuniary means or solvency of the parties to the note long before the fall of 1875. In fact the evidence of his witness and relative Van Antwerp shews that he (plaintiff) *must* have known something about it a very short time after he had the note from defendant.

Why is it that Van Antwerp, after making enquiries and after his interview with defendant *as early as July*, returned the note to plaintiff instead of taking it in payment for a mowing machine, and yet it is only towards the end of November, several days after the maturity of the note, *and after the endorser has become discharged for want of protest*, that plaintiff wakes up, and requires defendant to take the note back, and over a month elapses after this before the action is served on defendant. Defendant begs to refer to *Lewis & Jeffrey*, above cited, as a case in point; also Art. 1530 C. C.; also Delamarre and Le Poitvin, Droit Com., Tome 5, p. 269, 270, No. 193; also Benjamin on Sales, p. 351. "If in consequence of his delay *the position even of the wrongdoer is affected, he will lose his right to rescind;*" and the numerous authorities and precedents referred to by the learned Judge (the Hon. Mr. Justice Torrance) in the Lewis & Jeffrey case. It cannot be denied that the liberation of the endorser from liability must alone have made the position of defendant worse after the middle of November, notwithstanding the frivolous excuse given by the witness Hart for not protesting.

Thirdly. It must be admitted that, as a general rule, *the transferer by delivery is not liable.* Bayley on Bills, Par. 122, 123, 124. Girouard, par. 81. And it must also be noted that the note was not given for a precedent or pre-existing debt, but the note and the colt were delivered for each other at the same time; the only implied warranty in such a case being that the note *is not forged or fictitious.* But the plaintiff does not even pretend in his declaration that the defendant guaranteed the payment of the note, or promised in any way to make the amount good to plaintiff.

Of course the presumption is that he would have required defendant to endorse the note under Welch's name, if there had been any warranty on defendant's

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part. The whole case of plaintiff, therefore, rests on the evidence of Boulet and plaintiff's two boys as to the pretended false representation made by the defendant at the time of the trade. But this evidence is not satisfactory; they say it was in August (it is evident from Van Antwerp's evidence that the trade took place in July, and defendant alleges in his plea); the pretension that defendant said that Mr. Baker *had said* that the note *was as good as* $104 *in gold*, is an absurdity on the face of it, for the note, principal and interest *could not* amount to $104, neither in July, nor *even in August*. The boy Ralph Miller wants to make it as strong as possible, and swears that defendant said that if the note was not good, *he, the defendant, would make it good*, and Boulet says defendant warranted the note. This is too strong; it is probable that if that were true, plaintiff would have said so in his declaration. If, moreover, the bad character of Boulet for truth and veracity is taken into consideration, the Court will hardly come to the conclusion that the proof on that point is conclusive; friendly witnesses can easily give a favorable coloring to a casual conversation in the interest of their friend or relative; and the defendant respectfully submits that, even if he had no other grounds of defence, the proof of the alleged false representations is not sufficient to condemn him. As to the discharge of the endorser Welch from liability for want of protest, it cannot be pretended that he can be held without protest, for being *a party* to the note as payee he was not an *aval*. C. C. Art. 2311; Girouard, Par. 82, 83, &c.

The following was the judgment of the Court of Review:—

"The Court * * * considering plaintiff's allegations of declaration material proved;

"Considering that defendant knew when he passed the note referred to to plaintiff, that it was not a good one, or of value; that, under the circumstances, defendant ought to be condemned to pay plaintiff an amount equal to amount of said note, with interest and costs, as demanded;

"Considering that there is error in the said judgment of the 14th day of January last (1879) to the contrary, doth, revising said judgment, reverse the same, and proceeding to render the judgment that ought to have been rendered in the premises, doth grant *acte* to plaintiff of the deposit made by him of the said note, to wit, of the promissory note, dated Cowansville, January the 8th, 1875, made and signed by W. A. Osgood and R. M. Hall, jointly and severally, for the sum of $100, payable ten months after date to Harlow M. Welch, or bearer, with interest, for value received, and endorsed by the said Harlow M. Welch; and doth condemn the defendant to pay to plaintiff the said sum of $100 currency, with interest thereon from the 31st day of August, 1875, and with costs in the said Circuit Court against said defendant in favor of said plaintiff, and with costs of this Court of Revision against said defendant in favor of said plaintiff, distraction of which costs is granted to Messrs. Buchanan & Baker, attorneys of said plaintiff, and it is ordered that the record be remitted to the said Circuit Court."

Judgment of S. C. reversed.

Bethune & Bethune, for plaintiff.
E. Racicot, for defendant.
(S. B.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 3RD FEBRUARY, 1880.

Coram SIR A. A. DORION, C.J., MONK, J., RAMSAY, J., CROSS, J.

No. 27.

ROLFE ET AL.,

(*Petitioners in Court below,*)

APPELLANTS;

AND

THE CORPORATION OF THE TOWNSHIP OF STOKE,

(*Respondents in Court below,*)

RESPONDENTS.

HELD:—1. That a judgment of the Circuit Court in a proceeding under article 100 of the Municipal Code is susceptible of appeal to the Court of Queen's Bench, appeal side.

2. That a municipal valuation roll made by three valuators, of whom only two were legally appointed, is null and void.

The appeal was from a judgment of the Circuit Court, District of St. Francis, DOHERTY, J., dismissing a petition presented by the appellants praying for the annulment of a valuation roll made by the valuators of the Township of Stoke.

SIR A. A. DORION, C. J.—Les appelants se plaignent d'un jugement de la Cour de Circuit, qui a renvoyé leur requête pour faire annuler le rôle de cotisation fait pour le township de Stoke, pour l'année 1878.

La corporation intimée prétend qu'il n'y a pas d'appel d'un semblable jugement et demande que l'appel soit renvoyé.

Au mérite, elle soutient que la Cour inférieure, en renvoyant la requête des appelants parcequ'ils ne souffraient aucun préjudice des irrégularités dont ils se plaignent, a bien jugé.

Les appelants ont procédé en vertu de l'art. 100 du Code Municipal qui autorise la Cour de Circuit à mettre de côté un rôle de cotisation à raison des illégalités qui s'y trouvent, de la même manière qu'elle peut annuler un réglement municipal. D'après l'art. 698, tout électeur municipal peut, par une requête à la Cour de Circuit, faire déclarer nul un réglement entaché d'illégalité.

L'article 735 permet à toute personne qui se croit lésée par un rôle d'évaluation d'en demander la révision au Conseil, et si elle n'est pas satisfaite de la décision du Conseil Local elle peut en appeler au Conseil du comté en vertu de l'article 927. Il y a aussi appel à la Cour de Circuit de toute décision prononcée par un juge de la Cour Supérieure, sur les poursuites faites en vertu du Code Municipal, ainsi que de toute décision d'un Conseil de comté touchant un procès verbal qui a été fait et homologué ou une répartition qui a été amendée par tel Conseil, lorsqu'il ne siège pas en appel; (art. 1061,) ou encore d'une décision d'un bureau de délégués; (art. 1062,) mais il n'y a pas d'appel d'un jugement de la Cour Supérieure rendu en vertu de ces deux articles. (art. 1077).

L'art. 1033 du Code de Procédure Civile et qui fait partie du chap. 10 du titre deuxième de ce Code de Procédure Civile, déclare aussi qu'il n'y a pas d'ap-

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pel des jugements rendus en vertu des dispositions de ce chapitre lorsqu'ils ont rapport aux corporations municipales et aux officiers municipaux.

L'intimée invoque ces articles, 1077 du Code Municipal et 1033 du Code de Procédure Civile, pour dire qu'il n'y a pas d'appel dans cette cause-ci.

Mais c'est là une erreur. L'article 1077 ne s'applique qu'aux jugements rendus par un juge de la Cour Supérieure, lorsqu'il siège en Cour de Circuit sur un appel porté devant lui en vertu des articles 1061 et 1062 du Code Municipal, et l'article 1033 du Code de Procédure Civile n'a rapport qu'aux procédures spéciales qui tiennent lieu des procédures sur *quo warranto*, *mandamus* et brefs de prohibition.

La requête des appelants ne tombe dans aucune de ces catégories. C'est une procédure originaire donnée par le Code Municipal pour faire prononcer l'illégalité d'un réglement ou d'un rôle de cotisation;—et comme l'appel de jugements prononcés sur une telle procédure n'est pas prohibé, ces jugements sont régis par la règle contenue dans les § § 1 et 3 de l'article 1142 du Code de Procédure Civile, qui donne un appel de tout jugement de la Cour de Circuit, lorsque la somme ou la valeur de la chose demandée excède $100, ou lorsque ce jugement affecte les droits futurs des parties. Ici le jugement dont les appelants demandent la révision affecte des droits dont la valeur excède $100.

Cette Cour a déjà jugé dans les causes de McLaren et La corporation de Buckingham (21 juin 1875), dans celle de La corporation du comté de Brome et Cooey (21 Sept. 1878), et dans celle de Montreal Cotton Co. et La corporation de DeSalabery, (Septembre 1879,) qu'il y avait appel de jugements semblables rendus par la Cour de Circuit, dans les affaires municipales, lorsque les procédures avaient été adoptées en vertu de l'article 100 du Code Municipal.

Sur le mérite, les appelants se plaignent d'un grand nombre d'illégalités et entr'autres, que les cotiseurs n'ont pas été légalement nommés, qu'ils n'étaient pas qualifiés, qu'ils ont déposé leur rôle de cotisation le 22 juin 1878, sans l'avoir attesté, et qu'ils ne l'ont attesté que le 17 juillet, le jour qu'il a été homologué; que le secrétaire trésorier, qui a agi comme leur clerc lorsqu'ils ont fait le rôle, ne l'a attesté que le deux août, c'est-à-dire environ quinze jours après qu'il eut été homologué.

Le Code Municipal autorise le Conseil Municipal à nommer trois cotiseurs. (Art. 365.) Ces trois cotiseurs doivent agir ensemble et deux d'entr'eux ne peuvent pas seuls faire un rôle de cotisation. (Art. 733.) Le rôle doit être signé et attesté sous serment par au moins deux d'entr'eux et par le secrétaire trésorier ou autre personne qui aura agi comme leur clerc pour faire le rôle et cela avant qu'il ne soit déposé, (Art. 725.)

Dans le cas qui nous occupe, le Conseil Municipal a nommé trois cotiseurs, mais l'un deux étant absent et ne pouvant agir, le maire a pris sur lui d'en nommer un troisième, qui a fait le rôle de cotisation avec les deux autres, et le jour que le rôle a été homologué, le conseil a ratifié la nomination faite par le maire. Il est évident que lorsque le rôle a été fait, il n'y avait que deux cotiseurs, le troisième ayant été nommé par le maire qui n'avait aucune autorité pour le faire. La loi veut que le rôle soit fait par trois cotiseurs nommés par le conseil, et l'absence d'un cotiseur le rend nul.

De plus ni les cotiseurs ni le secrétaire trésorier qui a agi comme leur clerc n'ont signé, ni attesté par leur serment le rôle de cotisation avant de le déposer, comme le veut la loi.

Ce n'est pas un rôle de cotisation, c'est un papier blanc, qu'ils ont déposé. Personne n'était obligé de contester un pareil document. Ce n'est que le jour qu'il a été homologué qu'il a été signé et que les cotiseurs l'ont assermenté, et ce n'est que de ce jour-là que les intéressés pouvaient être appelés à le contester. La signature et l'attestation sous serment de la personne qui agit comme clerc des cotiseurs est aussi nécessaire que les leurs, et cependant le clerc n'a signé et attesté ce rôle qu'après son homologation.

Ce sont là des nullités radicales, qui ne peuvent être purgées par l'art. 16 du Code Municipal, qui n'a rapport qu'aux exceptions de forme et non à des objections comme celles qui sont invoquées par les appelants, et qui s'attaquent à la substance même du rôle qui est contesté.

Il est de l'essence d'un rôle de cotisation municipal qu'il soit fait par trois cotiseurs nommés par le conseil et qu'il soit signé et attesté, sans cela il n'y a pas de rôle de cotisation.

Pour ces raisons nous croyons que le jugement de la Cour de Circuit qui a renvoyé la Requête des appelants doit être infirmé.

The judgment is as follows:

"Considering that the petition of the appellants to set aside the valuation roll for the year 1878, for the township of Stoke, was an original proceeding initiated in the Circuit Court under the provisions of Article 100 of the Municipal Code, and that the judgment rendered on the said petition is appealable under the general provisions contained in Art. 1142 of the Code of Civil Procedure, this Court doth reject with costs the motion made by the respondents to dismiss the appeal;

"And considering that Isidore Gadbois, who acted as one of the valuators in preparing the said assessment roll was not appointed by the council, which council had alone, under Art. 365 of the Municipal Code, a right to appoint valuators, but was appointed by the mayor of the municipality who had no such right;

"And considering that the said valuation roll was neither signed nor attested by the valuators until the day it was homologated or approved of by the council, nor by the secretary-treasurer until after its homologation;

"And considering that the proper appointment of valuators by the council and the proper attestation of the assessment roll by the valuators, or by at least two of them, and by the secretary-treasurer who assisted them in the confection of the said roll, are essential to the validity of an assessment roll, and cannot be considered as mere formalities which may be dispensed with, under Art. 16 of the Municipal Code;

"And considering that there is error in the judgment rendered by the Circuit Court for the District of St. Francis, sitting at Sherbrooke, on the 10th of December, 1878;

"This Court doth reverse and set aside the said judgment of the 10th of December, 1878, and, proceeding to render the judgment which the said Circuit

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Court should have rendered, doth adjudge and declare the assessment or valuation roll of the Township of Stoke for the year 1878, made by F. H. Lothrop, I. Gauthier, and Isidore Gadbois, and adopted by the council on the 17th of July, 1878, null and void, and doth set aside the said assessment roll, and doth condemn the respondents to pay to the appellants the costs incurred on the petition of the appellants as well in the Court below as on the present appeal; (but without the costs of printing the interrogatories and answers on *faits et articles*, which should not have been included in the appendix to the factum).

Judgment reversed.

Brooks, Camirand & Hurd, for appellants.
Hall, White & Panneton, for respondents.
(J. K.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 3RD FEBRUARY, 1880.

Coram SIR A. A. DORION, C. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 138.

KANE,

(*Plaintiff contesting in Court below,*)

APPELLANT;

AND

RACINE,

(*Garnishee in Court below,*)

RESPONDENT.

HELD:—1. A sale of moveables, (not in the ordinary course of business), by a trader, when actually insolvent, though he did not become an insolvent under the Act until two months afterwards, to a creditor who knew or had reason to know of his insolvency, the price being credited by the purchaser to his debtor, is fraudulent and null and void, though the creditor may have allowed the full value of such articles on account of his claim.

2. The nullity of a sale in fraud of creditors may be invoked and pleaded by any creditor who was not a party to such fraudulent contract, in any proceeding in which the sale is set up against him by a fraudulent holder of the property sold.

3. Where a deed under the circumstances above stated is attacked by a creditor not a party to the deed, and who does not ask to be declared proprietor of the property alienated, it is not necessary to call into the cause all the parties to the alleged fraudulent deed.

The appeal was from the following judgment of the Superior Court, Montreal, MACKAY, J., 20th May, 1878:—

"The Court, having heard the plaintiff contesting and the *tiers-saisi*, by their respective counsel, upon the mérits of the contestation by plaintiff of the declaration made and fyled by said *tiers-saisi* in this cause, and also upon the motion by said *tiers-saisi*, of the 8th day of April last, to reject *répliques et réponses du demandeur*; having examined the proceedings, proof of record and evidence adduced, and on the whole duly deliberated, it is ordered that said *tiers-saisi* do take nothing by his said motion; And, on the merits;

"Considering that plaintiff contesting hath failed to prove the allegations of his said contestation;

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"Considering, moreover, that the declaration of the *tiers-saisi*, Racine, was not untrue, and that he had right to make it, as he did, when he did;

"Considering that he had then the piano in question by a real sale, not a simulated one, and that, if the contestant thought it a fraudulent one, he ought to have proceeded by an action revocatory, summoning all interested to answer his demand, by service of the demand upon them and of a writ: but even such conclusions as usual in actions revocatory, are not in the plaintiff's contestation, but are irregularly put into a later pleading, called 'Réponse à la plaidoirie du *tiers-saisi*, intitulée Exception Péremptoire,' doth dismiss the said contestation with costs, distraits to Messieurs Forget & Forget, attorneys for said *tiers-saisi*, reserving to plaintiff his recourse to a revocatory action to have the sale of the said piano set aside by a judicial decree, as he may be advised, if he, plaintiff, claim that the sale of the piano to *tiers-saisi* was fraudulent."

Sir A. A. DORION, C. J.—Le 13 novembre 1877, Marie Louise Lesage, femme de Paul Fournier, et alors débitrice de l'appelant, a vendu à l'intimé un piano et d'autres effets mobiliers au montant d'une somme de $428 pour le payer de ce qu'elle lui devait.

L'appelant, ayant appris que sa débitrice dissipait ses effets pour frauder ses créanciers, obtint le 16 novembre suivant, une saisie-arrêt avant jugement.

L'intimé assigné comme tiers-saisi déclara qu'il ne devait rien à la défenderesse et qu'il n'avait rien à elle en sa possession.

L'appelant tout en procédant contre la défenderesse, qui, le 4 avril 1878, fut condamnée à lui payer $226.16, contesta la déclaration de l'intimé, en alléguant qu'il avait en sa possession un piano qui appartenait à la défenderesse.

L'intimé admit par ses réponses qu'il avait eu un piano de la défenderesse, mais il déclara l'avoir acheté d'elle, et produisit un écrit sous seing-privé constatant la vente du piano et de certains autres articles en paiement de ce qu'elle lui devait.

L'appelant a alors demandé la nullité de la vente du piano parcequ'elle avait été faite par la défenderesse, en fraude des droits de ses créanciers à une époque où elle était insolvable, ce que connaissait l'intimé au temps de la vente.

Dans le mois de janvier, environ deux mois après la vente, la défenderesse a été mise en état de faillite, en vertu de l'acte des faillites de 1875. Elle devait alors plusieurs milliers de dollars, et n'avait pour tout avoir que quelques mauvais crédits. Il est de plus prouvé qu'à l'époque où l'intimé a acheté le piano, elle était notoirement insolvable. L'intimé admet que depuis un mois ou deux, il avait inutilement cherché à se faire payer ce qu'elle lui devait et qu'apprenant qu'elle avait vendu des effets à d'autres créanciers, il avait pris le piano et les autres articles, mentionnés dans l'écrit sous seing-privé qu'il a produit, en paiement de ce qu'elle lui devait.

Fournier, le mari de la défenderesse, et témoin de l'intimé, dit que ces articles ont été vendus plus que leur valeur et plus cher que la défenderesse ne les avait payés.

La fraude est abondamment prouvée et par l'insolvabilité notoire de la défenderesse et par les circonstances de la vente, qui suffisent pour démontrer que l'intimé savait ou devait savoir que sa débitrice était insolvable et en déconfiture.

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La Cour Inférieure n'a pas jugé la question de fraude. Elle a renvoyé la contestation de l'appelant, parcequ'il ne pouvait pas par une réponse demander la nullité de la vente sous seing privé faite en fraude de ses droits, qu'il aurait dû se pourvoir par action révocatoire, et mettre en cause tous ceux intéressés à contester sa demande en la leur signifiant avec un bref ou writ de sommation.

Est-il vrai que le créancier à qui l'on oppose un contrat fait en fraude de ses droits soit obligé de se pourvoir par action révocatoire pour le faire annuler, et qu'il ne peut demander cette nullité par voie d'exception ?

Pour l'affirmative l'on a cité la cause de Chaillé & Brunelle (6 Rap. Jud. B. C., 489.) Dans cette cause le demandeur Chaillé avait fait saisir un bateau. Le frère du défendeur le réclama par une opposition dans laquelle il alléguait l'avoir acheté, et qu'il en était en possession lors de la saisie. La Cour Supérieure donna à l'appelant main-levée de la saisie.

En appel le juge en chef Lafontaine et le juge Aylwin ont été d'opinion d'infirmer le jugement et les juges Duval et Caron de le confirmer. La Cour étant également divisée le jugement fut confirmé. L'un des motifs du jugement est que le demandeur aurait dû se pourvoir par action révocatoire.

L'on aurait pu citer encore la cause de Masson & McGowan, en appel le 19 décembre 1870. La Cour à une majorité de trois contre deux, et après re-audition, a infirmé le jugement rendu par la Cour Supérieure (1 L. C. L. J. 63; 2 L. C. L. J. 37), en se fondant sur ce que le demandeur aurait dû procéder par action révocatoire. Il y a encore la cause de Lacroix & Moreau, 15 Rap. Jud. B. C., 483, et 1 L. C. L. J. 33. Ici encore la Cour était divisée.

Il y a plusieurs décisions dans le même sens à la Louisiane. St. Avid & Weimprender, Syndics, 4 Martin's Rep., 704; Barbarin & Saucier, 8 Martin's Rep., 561; Yocum & Bulet, 9 Martin's Rep., 172, et Haw & Herriman, 1 Louisiana Rep. N. S. 535.

Il n'est cité aucune autorité à l'appui de ces décisions soit dans les rapports des causes jugées ici, ou de celles jugées à la Louisiane, en sorte qu'il est impossible de dire sur quoi les juges qui ont prononcé ces jugements se sont appuyés pour le faire. L'on voit seulement qu'à la Louisiane le juge Porter exprima d'abord un doute, puis, dans une cause subséquente, il jugea que l'action révocatoire était nécessaire, et cette décision parait avoir été suivie depuis dans diverses autres causes.

A l'encontre de ces arrêts nous pouvons citer les causes de Cummings et al. & Smith, B. R. 10 Rap. Jud. 122; McGinnis et Cartier, Révision, 1 L. C. L. J. 66; Lepage et Stevenson, B. R. 17 Rap. Jud. B. C. 209; Hans et D'Orsonens & D'Orsonens, Revision, 1870; Brown & Paxton B. R. 1875; Paré & Vachon, B. R., 1875; Rickaby et Bell, 2 Sup. C. Rep. 560, et McCorkill et Knight, 1879, confirmé par la Cour Suprême, 3 Sup. C. Rep. 233.

Dans toutes ces causes la nullité de l'acte fait en fraude des droits des créanciers a été invoquée par une contestation à une opposition afin d'annuler ou de distraire, excepté dans celle de Paré & Vachon qu'elle a été opposée par une réponse à une exception péremptoire, et dans celle de Bell & Rickaby par une exception à une requête en intervention.

Il y a encore la cause de Nesbitt et Gagnon, jugée à Québec en 1877. Ce

jugement a été infirmé, mais sur le mérite parce qu'il n'y avait pas de preuve de fraude, et non sur la question de procédure.

La Cour d'Appel s'est aussi prononcée dans le même sens, dans trois causes absolument semblables à celle-ci et dans lesquelles les créanciers ont opposé la nullité des actes faits en fraude de leurs droits par une contestation de la déclaration du tiers-saisi.

Ce sont les causes de Leclaire et al. & McFarlane, 12 Rap. Jud., B. C. 374. Celle de Lambert & Fortier, B. R. 1875, Boyer et al. & Duperreault, B. R. 1876.

Le jugement dans la cause de Leclaire & McFarlane a été infirmé au Conseil Privé, mais sur le mérite et non sur la procédure.

Dans la plupart de ces causes, la question de l'irrégularité des procédés et de la nécessité d'une action révocatoire avait été soulevée soit par les plaidoyers en Cour Inférieure ou pas les factums en appel.

Il ne peut donc y avoir de doute que la jurisprudence ici, malgré les quelques dissidences qui ont d'abord eu lieu, est maintenant constante et contraire au jugement rendu par la Cour Inférieure.

Cette jurisprudence est fondée sur ce que les actes faits en fraude des droits des créanciers leur sont étrangers, que le plus souvent ils ne les connaissent que lorsqu'on les invoquent contr'eux, et sur cette règle si universellement admise dans le droit français, que le droit que l'on peut invoquer par action, on peut toujours l'invoquer par exception. Ainsi lorsqu' un créancier saisit les biens de son débiteur, et qu'un tiers vient réclamer ces biens comme les ayant acquis du débiteur, le créancier peut toujours opposer à ce tiers les nullités soit absolues soit relatives de la vente qui lui a été faite. Ce tiers est, dans ce cas, un demandeur en revendication, et le créancier qui conteste fait une demande incidente dans la cause, à l'effet de faire annuler son titre.

Ici l'intimé a produit une vente sous seing-privé. Quelle action l'appelant pouvait-il porter pour faire annuler une vente dont il ignorait la date, les conditions et même, peut-être, jusqu'à l'existence? Supposons que cette vente eut été verbale, comme elle aurait pu l'être, y aurait-il eu possibilité pour un créancier de se pourvoir par action directe contre une telle vente?

L'appelant n'avait pas à s'occuper de cette vente tant que l'intimé ne l'invoquait pas, et du moment qu'elle était invoquée, il lui était loisible d'exciper que cette vente avait été faite en fraude de ses droits et d'en demander la nullité.

Les recueils d'arrêts abondent en décisions qui, sur des procédures incidentes, ont annulé des actes faits en fraude des droits des créanciers. Dalloz R. A. vo. Vente, pp. 847–8, note 2, cite un arrêt qui a jugé qu'un créancier était bien fondé à faire juger cette question sur une opposition afin d'annuler, faite par le débiteur à une saisie d'immeubles qu'il avait vendus. Dans cette cause la Cour a ordonné que l'acquéreur fut mis en cause.

Dalloz R. P. 1832, 1, 135, et Sirey 1827, 1, 53, le même 1861, 1, 452, citent d'autres arrêts où la question a été jugée sur des contestations à l'ordre.

L'autre motif pour lequel la Cour a renvoyé la contestation de l'appelant, c'est que toutes les parties intéressées n'avaient pas été assignées sur la contestation.

Cette objection ainsi que la précédente proviennent sans doute de la con-

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fusion que l'on fait entre la demande d'un créancier pour faire annuler un acte fait en fraude de ses droits, et l'action en résolution que l'une des parties à un acte porte pour le faire résilier pour erreur, dol ou fraude.

Dans le premier cas le créancier se plaint d'un acte fait par des tiers à son préjudice et auquel il n'a jamais consenti. Le débiteur et les tiers qui ont transigé avec lui ont concourru à la fraude. Ils ont commis à son égard un quasi délit qui lui a causé un préjudice, et ils sont conjointement et solidairement tenus de le réparer (3 Bédaride, de la fraude, Nos. 1433 et 1434.) Or c'est le propre des actions ou demandes solidaires qu'elles peuvent être portées contre celui des obligés que le créancier juge à propos de choisir. Si, cependant, la réparation consiste non dans des dommages mais dans l'annulation d'un acte et le recouvrement de propriétés aliénées, il faut nécessairement que celui qui en est en possession soit partie à la contestation.

Dans le cas de l'action en résolution d'acte, celui qui a été partie à l'acte a donné un consentement dont il doit se faire relever avant de pouvoir exercer aucun droit contraire aux stipulations qui y sont contenues, et comme les contrats ne peuvent se dissoudre que de la même manière qu'ils ont été formés, et avec le concours de tous ceux qui y ont été parties, il faut de toute nécessité que celui qui veut exercer un droit qu'il a cédé ou abandonné par ce contrat, commence par le faire mettre de côté en assignant tous ceux avec qui il a stipulé, c'est-à-dire toutes les parties au contrat. En tenant compte de cette distinction entre les deux demandes, l'on saisit facilement pourquoi l'on peut débattre le droit de propriété de la chose aliénée en fraude des créanciers avec tout détempteur frauduleux de cette chose, sans appeler tous ceux qui ont participé à la fraude, pendant que dans l'autre cas, il faut nécessairement procéder contre ceux qui ont été parties au contrat.

De plus lorsque dans le cours d'une procédure le tribunal s'aperçoit qu'un tiers dont les intérêts peuvent être affectés par la contestation n'a pas été assigné, il doit ordonner sa mise en cause et non renvoyer la demande. C'est ainsi que dans la cause rapportée par Dalloz au mot vente, que nous avons déjà mentionné, le tribunal a ordonné la mise en cause de l'acquéreur dont le titre était contesté.

Ici la contestation a été liée entre le créancier qui se plaint de la vente frauduleuse que sa débitrice a faite et l'acquéreur qui a participé à cette fraude, cela suffit, et comme la fraude a été clairement prouvée, nous devons infirmer le jugement rendu par la Cour Supérieure, déclarer la vente nulle, et ordonner à l'intimé de remettre le piano au shérif pour être vendu, sinon à payer la dette de l'appelant.

The judgment is as follows:—

"Considering that the appellant has established by legal evidence that, on and before the 13th of November, 1877, the said appellant was a creditor of Marie Louise Lesage, defendant in the Court below, for the sum of $226.16, for which sum he recovered judgment against the said Marie Louise Lesage on the 4th of April, 1878, with interest on the said sum from the 16th of November, 1877, and costs of suit;

"And considering that, on the said 13th November, 1877, the said Marie Louise Lesage, being then notoriously insolvent, and unable to pay her debts,

sold to the respondent a certain rosewood piano manufactured by 'Miller,' in payment of an antecedent debt, to wit, in part payment of a sum of $428, which she then owed to the respondent;

"And considering that such sale was not made in the ordinary course of business, and that, from the circumstances attending the sale, the respondent knew, or had reason to believe, that the said Marie Louise Lesage was then insolvent and unable to pay her debts;

"And considering that the sale so made is null and void, as being in fraud of the other creditors of the said Marie Louise Lesage, and of the appellant in particular;

"And considering that it was competent for the said appellant to contest the validity of the said sale on a contestation of the declaration made by the respondent as *tiers-saisi*, as was done in this cause, without proceeding by an *action révocatoire*;

"And considering, further, that, in contesting a sale made by his debtor in fraud of his rights, and to which he was not a party, the appellant was not bound to summon in the cause all the parties to the sale, and it was sufficient for him to join issue with the party found in the actual possession of the goods and chattels or other property so fraudulently conveyed;

"And considering that there is error in the judgment rendered by the Superior Court sitting at Montreal on the 20th of May, 1878;

"This Court doth reverse the said judgment of the 20th of May, 1878, and proceeding to render the judgment which the said Superior Court should have rendered, doth adjudge and declare the said sale of the 13th of November, 1877, null and void, as having been made in fraud of the rights of the appellant, and doth order that within fifteen days from the service of a copy of this judgment, the respondent do deliver unto the sheriff in and for the district, or to any bailiff committed to receive the same, the said rosewood piano manufactured by "Miller," which the said Marie Louise Lesage has conveyed to the said respondent as aforesaid; the said piano to be sold, and the proceeds paid and distributed in due course of law, unless within the said fifteen days the respondent do pay to the appellant the said sum of $226.16, with interest thereon from the 16th November, 1877, and the costs incurred on the said judgment rendered on the 4th of April, 1878, in favor of the said appellant against the said Marie Louise Lesage; and in default of the said respondent delivering the said piano or paying the said debt, interest and costs as aforesaid, within the said delay of fifteen days, the said respondent is hereby condemned to pay to the appellant the said sum of $226.16, with interest thereon from the 16th of November, 1877, and costs as aforesaid, to be levied out of the goods and chattels and other property of the said respondent;

"And the Court doth further condemn the respondent to pay to the appellant at all events, in any of the aforesaid cases, the costs incurred in the contestation of the respondent's declaration as *tiers saisi* in this cause, as well in the Court below as on the present appeal (The Hon. Mr. Justice Tessier dissenting.)"

Doutre & Doutre, for appellant.

Forget & Forget, for respondent.

D. Major, counsel.

(J. K.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 19TH JUNE, 1880.

Coram SIR A. A. DORION, C.J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 125.

THOMAS WILSON ET AL.,
(*Plaintiffs in the Court below*),
APPELLANTS;

AND

THE CITY OF MONTREAL,
(*Defendant in the Court below*),
RESPONDENT.

HELD:—That the Corporation of the City of Montreal, in exacting, under threat of execution, the assessment imposed by an assessment roll apparently clothed with all legal formalities, but which was subsequently set aside by the Courts, was not in "bad faith" within the meaning of Art. 1049 C. C., and therefore was not bound to pay interest on the money from the time of receiving it, but only from the date of the action *en répétition*.

The appeal was from a judgment of the Superior Court, Montreal, MACKAY, J., condemning the respondent to repay to the appellants, as executors of the late Hon. Charles Wilson, the sum of $1,264 34 collected from him on the 19th June, 1869, under an illegal assessment roll. The appellants complained of the judgment only in so far as it refused interest from the date the tax was paid (the judgment allowing interest merely from the date of the service of process).

The following extract from the judgment of the Court below is all that has any bearing upon this point:

"Considering * * * that up to the institution of the present action these moneys had not been demanded, and that, therefore, and by reason of the defendant's good faith and plaintiff's knowledge of the law and facts when he paid, they, the said defendants, are not bound to pay interest on the said sums except from date of service of process; the plaintiff when he paid was aware of the law and of the facts, the taking of said money by defendant was not immoral, and plaintiff had been advantaged by defendant's operations, widening the Place d'Armes Hill referred to, for his, plaintiff's property, had been improved," &c.

SIR A. A. DORION, C.J.—La seule question qui nous est soumise dans cette cause est celle-ci: les appelants qui répètent une somme qu'ils ont payé sans cause, ont-ils droit aux intérêts de cette somme du jour du paiement qui en a été fait, ou seulement du jour de la demande en répétition?

Le 19 juin 1869, feu Charles Wilson, l'auteur des appelants, paya à la cité de Montréal une somme de $1,236 31 à laquelle il avait été cotisé pour l'élargissement de la côte de la Place d'Armes, plus $28 03 pour intérêts alors échus, en tout $1,264 34.

M. Wilson fit ce paiement sous protêt et le trésorier de la cité lui donna un reçu dans ces termes:

"Received from the Hon. Charles Wilson the above amount, which he declares "he pays under protest and to save proceedings in execution, with which he says "he is threatened."

(Signed,) JAMES F. D. BLACK,
City Treasurer.

Wilson et al., and The City of Montreal.

Plus de sept ans après ce paiement, le 26 octobre 1876, M. Wilson porta cette action. Il allègue, dans sa déclaration, que le rôle de cotisation en vertu duquel il a payé cette somme de $1,264 34 était nul, et il conclut à ce que l'intimée soit condamnée à la lui rembourser avec intérêts du 19 de juin 1869, jour du paiement.

Cette demande a été contestée et la Cour Inférieure a condamné l'intimée à rembourser la somme réclamée, mais avec intérêt à compter du 28 octobre 1876.

Les appelants prétendent que les intérêts auraient dû leur être accordés à compter du jour du paiement et non du jour de la demande.

"Celui qui reçoit par erreur de droit ou de fait, ce qui ne lui est pas dû est "obligé de le restituer; et s'il ne peut le restituer en nature d'en payer la valeur."

"Si la personne qui reçoit est de bonne foi, elle n'est pas obligée de restituer "les profits qu'elle a perçus de la chose." Art. 1047 C. C.

"S'il y a mauvaise foi de la part de celui qui a reçu, il est tenu de restituer la "somme payée ou la chose reçue, avec les intérêts ou les profits qu'elle aurait dû "produire du jour qu'elle a été reçue ou que la mauvaise foi a commencé." Art. 1049 C. C.

D'après ces deux articles, qui sont en substance les mêmes que les articles 1736 et 1738 du Code Napoléon, il n'y a qu'un cas où celui qui a reçu ce qui ne lui était pas dû en doive les intérêts, c'est lorsqu'il savait lors du paiement que la chose ne lui était pas due ou qu'il en a eu connaissance depuis.

Ici il n'y a aucune raison de prétendre que la Corporation était de mauvaise foi lorsqu'elle a reçu le paiement d'une cotisation en vertu d'un rôle qui, en apparence, était revêtu des formalités requises par la loi, et il n'y a aucune preuve qu'elle ait su que ce rôle était nul avant la demande formée par cette action.

Les appelants admettent que les articles cités contiennent la règle générale; mais ils prétendent que cette règle ne s'applique qu'au paiement fait volontairement, et qu'il y avait dans l'ancien droit une exception en faveur de ceux qui étaient contraints de payer ce qu'ils ne devaient pas—à laquelle le Code n'a pas dérogé—et qu'ils sont dans cette exception puisque leur auteur n'a payé que sous protêt et parcequ'il était menacé d'exécution.

Ils citent Merlin vo. Intérêts §3 qui dit: "celui qui a payé volontairement ce "qu'il ne devait pas, et qui le répète en justice, ne peut exiger les intérêts que du "jour de la demande, mais s'il n'a payé que comme contraint ce qu'il ne devait "pas, les intérêts lui sont dus à compter du paiement."

Ce passage est extrait textuellement de Guyot vo. Intérêts. Rousseaud de Lacombe vo. Intérêts, No. 9, s'exprime dans les mêmes termes et cite Bretonnier sur Henry.

Rolland de Villargues, Dict. vo. Intérêts, Nos. 100 et 101, dit également: "Il "faut aussi décider que lorsqu'un individu a été injustement poursuivi et forcé "de payer ce qu'il ne devait pas, il a droit aux intérêts de la somme indument "payée, à partir du paiement."

"Mais celui qui sans y être contraint aurait payé par erreur, ne pourrait "réclamer, contre celui qui a reçu de bonne foi, les intérêts de la somme par lui "payée, que du jour de la demande, attendu que le paiement a été volontaire."

Cet auteur refère à Lecamus (je n'ai pas pu trouver le passage indiqué), et à Bretonnier.

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Ce dernier ne cite aucun arrêt, ni l'opinion d'un seul écrivain au soutien de l'opinion qu'il émet, et il est évident que cette opinion a été copiée sans examen par les auteurs des différents recueils que les appelants ont cités.

Ni Pothier qui a tout un traité sur cette matière, ni Demolombe, ni Larombière ne font allusion à une pareille exception.

J'ai trouvé un seul arrêt qui a condamné celui qui avait reçu le paiement d'une somme qui ne lui était pas due à la rembourser avec intérêt du jour du paiement et non du jour de la demande, c'est celui de Delongchamps & Coutte, rapporté au Journal du Palais à la date du 11 novembre 1828. Dans cette cause le défendeur, condamné en première instance à payer une certaine somme au demandeur, la paya pour éviter une contrainte en déclarant qu'il entendait appeler du jugement prononcé contre lui. Ayant réussi en appel, il fit sa demande en répétition et obtint les intérêts du jour du paiement. C'est le cas prévu par l'article 1124 du Code de Procédure Civile, et le tribunal motiva son jugement tant sur la mauvaise foi du demandeur que sur le fait que le défendeur avait été contraint et forcé de payer.

Cet article 1124 a été cité comme reconnaissant le principe que celui qui est contraint de payer une somme qu'il ne doit pas a droit aux intérêts à compter du paiement qu'il en a fait. Si la règle avait été ainsi que le prétendent les appelants, l'article aurait été inutile, puisque sans l'article celui qui aurait payé pour éviter une exécution aurait eu le droit de répéter les intérêts de la date du paiement. J'en infère donc qu'au lieu d'être une confirmation de la règle que les intérêts sont dus du jour du paiement, c'est au contraire une exception au principe que, hors le cas de mauvaise foi, les intérêts ne sont dus que du jour de la demande. Et il y a une excellente raison pour admettre cette exception, c'est que la partie qui a été condamnée et qui exécute le jugement sous réserve de son appel, ne peut intenter l'action en répétition avant d'avoir fait décider l'appel et fait annuler la sentence qui l'a condamné à payer. En adoptant les procédés sur appel, il a fait tout ce qu'il est en son pouvoir de faire pour pouvoir répéter ce qu'il a payé indument, et le priver des intérêts dans ce cas, serait le priver d'intérêts qu'il n'était pas en mesure de répéter avant d'avoir fait infirmer le jugement.

Quant à la citation faite par les appelants d'un passage de Laurent t. 20 p. 334, cet auteur ne combat pas la règle invoquée par l'intimée, au contraire, il admet que cette règle est celle adoptée par l'article 1736 du Code Napoléon qui ne fait courir les intérêts que du jour de la demande; seulement il combat les motifs donnés lors de la discussion du Code Français et prétend que l'on aurait dû adopter une solution différente.

Sans entrer dans cette discussion qui serait oiseuse, puisqu'elle ne porterait pas sur la loi telle qu'elle est, mais sur ce qu'elle devrait être, il suffit de dire que l'autorité de Laurent ne milite nullement contre les prétentions de l'intimée.

Maintenant quant aux décisions de nos Cours, il y a la cause de Leprohon & le Maire de Montréal, 2 L. C. Rep. 180, dans laquelle les intérêts n'ont été demandés que du jour de l'assignation. Celle de Buckley & Brunelle, 21 L. C. J. p. 133, où ils n'ont été accordés que du jour de la demande, et celle de Baylis & la Cité de Montréal, jugée par cette Cour le 22 décembre 1879, et dans

laquelle les intérêts, quoique demandés du jour du paiement, n'ont été accordés que du jour de la demande. Wilson et al., and The City of Montreal.

Il est vrai que l'on a cité la cause de Caron & La Corporation de Québec, 10 L. C. Jurist, 317, et celle de Sutherland & The City of Montreal, jugée le 16 septembre 1876, dans lesquelles les intérêts ont été accordés à compter de la date du paiement, mais la question ne paraît pas avoir été soulevée ni dans l'une ni dans l'autre de ces causes. Dans celle de Caron & La Cité de Québec il ne s'agissait que d'une somme de $60, et l'action a été portée quelques jours seulement après le paiement fait. Dans celle de Sutherland la question ne paraît pas avoir été soulevée.

Sur le tout nous croyons que l'opinion émise par Bretonnier et adoptée dans les recueils de Guyot, de Merlin, de Rousseaud de Lacombe, et de Rolland de Villargues, doit être restreinte au cas où le paiement forcé est fait sur un jugement, qui est ensuite annulé sur un appel, comme l'implique le passage tiré de Rolland de Villargues. Dans ce cas cette opinion se concilierait avec les règles consignées dans les articles 1047 et 1049 du Code Civil et 1124 du Code de Procédure, qui doivent dans tous les cas prévaloir, comme étant plus conformes aux vrais principes et à la doctrine des auteurs les plus accrédités, sur une opinion douteuse, émise longtemps avant la promulgation du Code, par des écrivains qui, probablement, n'avaient pas considéré toute la portée des termes généraux dont ils se sont servis.

Le jugement de la Cour Inférieure, qui n'a accordé les intérêts que du jour de la demande, doit être confirmé.

MONK, J., dissented, on the ground that the threat of an execution amounted to coercion, and entitled the party to interest from the time the money was so exacted from him.

Judgment of S. C. confirmed.

Barnard & Monk, for the appellants.
R. Roy, Q.C., for the respondent.
(J.K.)

COURT OF REVIEW, 1879.

MONTREAL, 29TH DECEMBER, 1879.

Coram JOHNSON, J., JETTE, J., LAFRAMBOISE, J.

No. 2644.

The Montreal & Ottawa Forwarding Co. vs. *Dickson.*

HELD:—That a judgment dismissing an *exception à la forme* cannot be revised by the Court of Review, on an inscription for revision of the final judgment in the case which makes no mention of the prior judgment.

JOHNSON, J.—This case has been inscribed for revision of "the judgment of the Superior Court for the district of Montreal, in this cause rendered on the 30th day of April last;" namely, the final judgment in the case. At the hearing, however, it turned out that the main object sought to be obtained by this inscription was the reversal of a judgment which dismissed an *exception à la forme;*

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a class of judgment not susceptible of review by this Court. This judgment, moreover, was in no way referred to in the final judgment. Under the circumstances, it is quite impossible for this Court to do otherwise than simply confirm the judgment referred to in the inscription, which appears to us to be in all respects correct.

Judgment of S. C. confirmed.

Coursol & Co., for plaintiff.

Davidson & Cushing, for defendant.

(S.B.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 16TH MARCH, 1880.

Coram Sir A. A. DORION, C.J., MONK, J., RAMSAY, J., CROSS, J., CARON, J., *ad hoc*.

No. 123.

LA SOCIÉTÉ DE CONSTRUCTION DU CANADA,
(*Defendants in Court below,*)
APPELLANTS;

AND

LA BANQUE NATIONALE,
(*Plaintiffs in Court below,*)
RESPONDENTS.

HELD:—1. A negotiable promissory note made by a Building Society, or other corporate body, not specially authorized by its charter to make promissory notes, is a promise held out to the public that it will pay the amount to the order of the person named therein, and will be held good as an acknowledgement of indebtedness; and the endorsee of such note may recover the amount thereof from the Corporation, promissor, on the mere production of the note, in the absence of a plea specially denying the existence of the debt, or that valid consideration was received by the Corporation.

2. The authority of the officers of an incorporated Company to make a promissory note, which is signed on behalf of the Company by the President and Secretary, will be presumed in the absence of a special denial that they were duly authorized.

3. A party in good faith will be allowed to affix double stamps to a promissory note even when the case is in appeal.

The appeal was from a judgment of the Superior Court, Montreal, PAPINEAU, J., 1st May, 1877, dismissing a demurrer, and from the final judgment, RAINVILLE, J., 11th May, 1877, maintaining the action of the respondents.

The final judgment was as follows:—

"La Cour, après avoir entendu la demanderesse par ses avocats sur son inscription pour audition au mérite tant sur la contestation liée avec la défenderesse "La Société de Construction du Canada," qu'*ex parte* contre les autres défendeurs, la dite Société de Construction du Canada, quoiqu'appelée n'ayant pas comparu à l'audition, et les autres défendeurs, L. W. T. Fréchet, O. Lecours, H. Giroux, et Jos. Brunet n'ayant pas plaidé à l'action et étant dûment forclos de ce faire, avoir examiné la procédure et les pièces produites et délibéré; condamne les défendeurs conjointement et solidairement à payer à la demanderesse la somme de $2,020.21 cours actuel, savoir: $2,000, montant du billet promissoire, daté Montréal, le 13 octobre 1876, fait et signé par la dite défenderesse "La Société de Construction du Canada" agissant par O. Lecours, son Président, et L. W. T. Fréchet, son Secrétaire-Trésorier, payable à trois mois de date, à l'ordre du dit L. W. T. Fréchet, au bureau de la Banque

La Société de Construction du Canada and La Banque Nationale.

Ville Marie, pour valeur reçue; et par le dit défendeur L. W. T. Frechet, endossé et remis au défendeur O. Lecours, qui l'endossa et le remit au défendeur H. Giroux, qui l'endossa et le remit à Jos. Brunet, qui l'endossa et le remit à la dite demanderesse; $3.54, frais de protêt du dit billet, et $16.67, pour l'intérêt échu sur le montant du dit billet depuis son échéance jusqu'à la date de l'institution de la présente action; avec intérêt sur $2,020.21 à compter du 9 mars 1877, jour de l'assignation, jusqu'à paiement, et les dépens distraits à Messieurs Geoffrion, Rinfret, et Archambault, avocats de la demanderesse."

Cross, J.—The respondent, La Banque Nationale, on the 8th March, 1877, brought an action against la Société de Construction du Canada, now appellant, being a Building Society under Cap. 69 of the Consolidated Statutes of Lower Canada, for $2,020.21, amount of a promissory note made at the city of Montreal, 13th October, 1876, signed on behalf of the Society by the President and Secretary, payable to the order of L. M. T. Frechet, who endorsed it to O. Lecours, the President of the Society, who endorsed it to H. Giroux, who endorsed it to Jos. Brunet, who endorsed it to the Banque Nationale.

La Société de Construction demurred to this action on the grounds following:

1. That the declaration showed no privity of contract, *lien de droit*, between the parties.

2. That it showed no claim or right by the Bank against la Société de Construction.

3. That the allegations did not justify the conclusions.

4. That the powers of the Society were determined by the 69th Cap. of the Revised Statutes for Lower Canada, and do not include the power of making promissory notes, or thereby binding themselves by the signatures of their President and Secretary.

They further pleaded a *défense en fait*, denying all the allegations of the declaration.

The demurrer was dismissed 1st May, 1877, the appellant taking exception to the judgment.

Without further proof than the promissory note and protest, the Superior Court, on the 11th May, 1877, gave judgment in favor of La Banque Nationale for the amount of the note, with costs of protest and interest.

From these two judgments La Société de Construction du Canada has taken the present appeal, and urges:

That the Society had no right to borrow;

That the Bank did not prove their demand;

That La Société had no power to make a promissory note;

That, as appears by the documents produced, certain essential allegations of the declaration are false.

The views entertained by the Courts in England, so far as I have been able to ascertain from the course of the decisions there, would seem to indicate that the making of negotiable promissory notes or other negotiable instruments by a non commercial corporation, not specially authorised by its charter, or by the by-laws it was entitled to make in virtue of its charter powers, would be *ultra vires*; but to this rule an exception was allowed—where the making of such

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instruments was incident to the nature of the business the corporation was authorised to contract. Thus, in the case of the *General Estates Co., ex parte the City Bank*, L. R. 3 Chan. Appeal Cases, p. 762, bonds had been issued by the General Estates Co., Limited, being in fact a Building Society. They contained a promise to pay to the order of one J. C. Hodges, who sold them to one Herman, to whom Hodges transferred them as well by endorsement as by deed, the latter being acknowledged and registered by the Company, so that they became payable to the order of Herman. He pledged and endorsed them for value to the City Bank, which Institution, on the General Estates Co. being insolvent, claimed to prove for the amount of the bonds against their insolvent estate. This was resisted by the official liquidator, on whose behalf it was contended that the instruments were bonds, not promissory notes; that the General Estates Co. had no power to issue negotiable instruments, more especially promissory notes, and that Herman being the payee and a debtor of the Company, if the proof were allowed it should be subject to the claim of the Company against Herman.

The Court held the instruments to be negotiable and to be provable by the City Bank against the General Estates Co., without being subject to the equities of the claim of the Company against Herman.

Sir W. Page Wood in his remarks says: Corporate bodies may issue promissory notes and bills of exchange when the nature and character of their business warrants it; and further on: "The better opinion seems to me to be that this is a promissory note; but, if it be not so, the authorities go to this that where there is a distinct promise held out by a company informing all the world that they will pay to the order of the person named, it is not competent for that company afterwards to set up equities of their own, and say that, because the person who makes the order is indebted to them, they will not pay."

Brice in his treatise of *Ultra Vires*, edition of 1877, at p. 297, approves of this decision, and at p. 830, where he treats of a distinction he makes between the primary and secondary capacities of corporations, he says: whatever is outside or not allowed by the primary capacities will be *ultra vires* in the strict and true sense. Whatever is outside or not allowed by the secondary capacities will be *ultra vires* in the other sense.

No corporation can go outside its strict enterprise or scope. But all corporations in prosecuting this employ certain means, they must have agents, money, offices, and the like.

It is quite clear that certain means may not be employed by certain corporations, *e. g.*, negotiable instruments by railway companies. But it is not the true view that such employment would be *ultra vires* in the secondary sense only. Every corporation can be authorized to issue negotiable instruments, but it is only railway corporations which can make railways.

So with other means, take borrowing: A mining corporation cannot without express power, but it can give itself such power. Is this any more than the statement that, though acts outside the aims of such corporations are *ultra vires* in a strict sense, yet the employment of such a means or implement as borrowing is only *ultra vires* in the secondary sense, invalid by the dissent, and

restrainable upon suit by any sing'e corporator, but perfectly valid when all agree.

He then proceeds to give his views to the effect that where there has been "substantial" part performance, such a course of conduct by the corporation, and such action by the other side as to shew that both parties intended the due carrying out of the transaction, then it is too late for the corporation to object to the invalidity of the matter, and, if it does so, it will be exactly in the same position as if it refused to carry out any other binding contract.

He admits that it might be different if an individual stockholder brought a suit to restrain the Company from acting in a transaction so *ultra vires* even in a secondary sense.

It is to be regretted that the author has not succeeded in exposing his meaning with greater clearness, but it must be admitted that the subject is difficult, and I do not doubt that his doctrine is sound. It would at least seem so to me if I rightly interpret his meaning, which I think amounts to this:

1. That a commercial corporation may validly make and issue negotiable promissory notes and other negotiable instruments.

2. That a corporation specially authorised by its charter, or having power to make by-laws for the purpose and having made such by-laws, may do the like.

3. That a non-commercial corporation, irrespective of any such by-laws, may do the like if the nature and character of the business it is authorised to transact warrants it.

4. That, although the making and issuing of such instruments by a corporation may be *ultra vires* it is only so in a secondary sense, and will be binding on the corporation, unless the transaction be sought to be restrained at the instance of some one interested as a corporator.

5. That a promise held out to the public by an incorporated company that they will pay to the order of a person named, that person can transfer the instrument by endorsement so that the company cannot set up in compensation against the holder any debt that such transferror may afterwards come to owe the company.

The application of these principles will remove the apparent difficulty in this case.

It is to be remarked that, although the plea denies the right or power of the Corporation appellants to make or issue promissory notes, it contains no special denial that the officers of the Corporation were authorised to make and issue the promissory note in question, nor any allegation of the absence of a debt being due by the Corporation for which the promissory note might have been granted. In the absence of any such special denial or of any proof affecting the consideration of the promissory note in question, the Court will presume that it was duly authorised, that it is good at least as an acknowledgment of indebtedness, and was given for value. This is in accordance with the equitable principles of our own law, and also with the recent decisions in the United States. See Abbott's Digest of the law of Corporations, verbo, Bills and Notes, p. 116. See also the Upper Canada case cited at the bar. (*Snarr* v. *Toronto P. B. & S. Society*, 29 U. C. Q. B. Rep., p. 317.)

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The point would be one of importance if it were up for settlement for the first time, but this Court has already held in the case of *The Corporation of the Township of Grantham and Couture*,* that the promissory note even of a Municipal Corporation would be held good as an acknowledgment of indebtedness. We are not disposed to go back on that decision, and we hold in the same sense in this case.

A further question has been raised, which does not seem to have been mooted in the Court below, that is, that the stamps used on the promissory note in question were not cancelled as required by law; this is evident, and is not denied by the respondents, but they contend that it is an error of omission, and have petitioned this Court, supported by affidavit, asking leave to be permitted to remedy the error by affixing double stamps on the Bill in question and now making the necessary cancellation thereon. The Court is convinced of the reasonableness of this application, and the only difficulty is as to the power of this Court, being one of appellate jurisdiction only, to permit this to be done.

The last provision on the subject of remedying such errors is contained in sec. 13 of the Act, 42 Vic., c. 17, which, though passed in 1879, since the institution of this action, and similar in its terms to sec. 12 of the 37 Vic., cap. 47, passed also since the negotiation of the Bill in question, nevertheless applies because it affects procedure only and gives a new remedy. Its provisions are ample, enacting that: "where, in any suit or proceeding in law or equity, "the validity of any such instrument is questioned, by reason of the "proper duty thereon not having been paid at all, or not paid by the "proper party, or at the proper time, or of any formality as to the date or "*erasure of the stamps affixed having been omitted*," &c., &c., even although such knowledge shall have been acquired only during such suit or proceeding; and if it shall appear in any such suit or proceeding to the satisfaction of the Court or Judge, as the case may be, that it was through mere error or mistake, &c.; then such instrument, or any endorsement or transfer thereof, shall be held legal and valid, if the holder thereof shall pay the double duty thereon, &c.

The general provision for remedy of such defects contained in sec. 12 of 33 Vic., c. 14, passed before the Bill in question was made, although not so specially applicable to this particular case, would, nevertheless, have probably been considered sufficient to admit of the application of the remedy which the respondent seeks. Now it has been made to appear by affidavits to the satisfaction of the Court here, that it was through mere error or mistake, and without any intention to violate the law on the part of the holder, the now respondents, that the effacing of the stamps on the Bill now sued on was omitted. We, therefore, believe that the above proceeding is sufficient to authorize us, even as a Court of Appeal, where the objection has been first taken and where the proceedings are now had, to give effect to the respondent's petition to be allowed to pay double duty and efface the stamps, but subject to costs to the appellant on this application.

* 24 L. C. Jurist, 105.

The judgment of this Court will, therefore be, that, on the defects in question being remedied by the respondents, the judgments in the Court below in their favor will be confirmed. La Société de Construction du Canada and La Banque Nationale.

Vilbon & Lafleur, for appellants.

Geoffrion, Rinfret & Dorion, for respondents.

(J.K.)

COUR SUPERIEURE, 1880.

MONTREAL, 30 JUIN 1880.

Coram RAINVILLE, J.

No. 118.

Montchamps et al. vs. *Perras.*

JUGE:—1o. La clause d'une obligation portant que le paiement *aura lieu à telle époque, sans intérêt jusqu'au terme, ou que le paiement aura lieu à telle époque pour tout dommage à peine &c.*, équivaut à une stipulation d'intérêts à partir de l'expiration du terme.

2o. Que la clause d'un contrat, étrangère à l'objet principal que les parties avaient en vue en le passant, fait preuve de son contenu, si cette clause, au lieu d'être une déclaration unilatérale de l'une des parties, forme un nouveau contrat intercalé dans le premier.

3o. Que le paiement d'une somme, excédant cinquante piastres pour la dernière année d'intérêts sur le capital de deux obligations différentes, et la reconnaissance faite par le créancier que tous les arrérages d'intérêts ont été payés, ne peuvent être établis par la preuve testimoniale, lors même que l'intérêt annuel sur chaque obligation serait d'une somme moindre que cinquante piastres.

Par leur action, les demandeurs, comme héritiers de leur père, réclamaient $594.88 pour neuf années d'intérêt au taux de huit pour cent, sur le capital de deux obligations, consenties pour prêt d'argent. La première obligation en date du 21 mars 1853, est pour une somme de $666.66, stipulée payable dans un an de la date de l'obligation à peine, etc.

La seconde obligation est en date du 7 janvier 1864, et porte que la somme de $250.00, montant du prêt, sera remboursée au mois de mai de la même année, sans intérêt jusqu'à l'échéance.

Les demandeurs alléguaient une convention spéciale par laquelle le défendeur s'était engagé à payer à leur père, créancier des deux obligations, des intérêts annuels au taux de huit pour cent. Il n'était rien dit de l'époque ni du lieu de la convention ; mais on affirmait que le défendeur avait, de fait, payé des intérêts à ce taux jusqu'en 1871.

Le défendeur a nié cette convention, il a admis qu'il avait payé des intérêts au taux de huit pour cent, mais à la demande renouvelée, chaque année de son créancier et non en vertu d'une convention arrêtée entr'eux ; il a de plus prétendu avoir payé tous ses intérêts jusqu'à l'époque de l'institution de l'action ; et subsidiairement il a plaidé la prescription quinquénale.

A l'enquête les demandeurs ont tenté d'établir la convention spéciale de payer des intérets, au taux de huit pour cent, par les aveux du défendeur. Le défendeur a avoué qu'il avait payé des intérêts au taux de huit pour cent chaque année, à la demande de son créancier, mais il a ajouté qu'il avait ainsi payé tous ses arrérages d'intérêts jusqu'au jour de l'institution de l'action.

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Pendant l'enquête, les demandeurs ont découvert un troisième acte d'obligation du défendeur à leur père. Cet acte est en date du 19 juillet 1866, et est pour prêt d'une somme de onze cents livres, ancien cours. Dans cette obligation de 1866 se trouve une clause portant que les intérêts sur les deux premières obligations sus-citées ont été payés jusqu'en 1866, et ajoutant: " .....ces " deux obligations porteront intérêt à l'avenir, à raison de huit pour cent, ce " dont le débiteur convient."

Le défendeur a fait entendre, comme son unique témoin, son fils qui déclare avoir vu le défendeur, en mars 1879, payer $70.00 au père des demandeurs pour la dernière année d'intérêts sur les deux obligations, et qui ajoute que le père des demandeurs a donné alors quittance verbale au défendeur pour tous arrérages d'intérêts.

M. Bonin, pour le défendeur:—

L'obligation du 21 mars 1853 ne contient aucune stipulation d'intérêts; ces mots: "le prêt remboursable à terme, pour tout dommage à *peine*, &c.," ne peuvent pas équivaloir à une stipulation d'intérêts, à compter de l'expiration du terme; ils ne peuvent vouloir dire autre chose que le défaut de paiement à terme, donnerait au créancier le droit de réclamer des dommages-intérêts; art. 1077, Code Civil du B. C. Ces dommages-intérêts, qui, dans l'espèce actuelle, consistaient dans l'intérêt au taux fixé par la loi, n'étaient dus que du jour de la mise en demeure. Le défendeur n'a jamais été mis en demeure de payer, soit le capital, soit des intérêts, avant la présente demande en justice, et il ne peut être contraint à payer des intérêts antérieurs à l'institution de l'action; la cause Rice vs. Ahern, rapportée au 12me vol. des Décisions Judiciaires du Bas-Canada, page 280, n'est pas applicable, en autant que dans cette dernière cause, la clause contenue dans l'acte d'obligation "sans intérêt depuis la date du prêt jusqu'à "l'échéance" faisait présumer une stipulation d'intérêts après l'expiration du terme, tandis que, dans le cas actuel, l'obligation du 21 mars 1853 ne contenait aucune telle clause. La décision dans Rice vs. Ahern ne pourrait, tout au plus, s'appliquer qu'à l'obligation du 7 janvier 1864, laquelle contenait une clause de paiement à terme fixe, sans intérêt jusqu'à échéance.

Quant à l'acte d'obligation du 19 juillet 1866, il ne fait pas preuve de son contenu pour ce qui regarde la clause énonçant une stipulation d'intérêts sur les deux premières obligations suscitées. Cette clause simplement énonciative n'a aucun rapport à l'obligation et est complètement étrangère à l'objet que les parties avaient en vue en passant l'acte; cette clause ne peut servir que comme commencement de preuve. Article 1210 Code Civil B. C.; Demolombe, 29me vol. Nos. 288, 289, 290; Pothier, oblig. 738; Bonnier, No. 509; Demolombe, 25me vol., Nos. 1 et suivants; Cass. 4 mars 1834; Cass. 18 août 1840; Bourguignon, Dev. 1840, 1, 735.

Demolombe au lieu cité, dit:..... ou l'énonciation a un rapport " direct à la disposition ou à la convention qui fut l'objet principal de l'acte, et " que les parties ont eu précisément en vue. Ou, au contraire, l'énonciation y " est étrangère, et ne s'y rattache par aucune corrélation logique. Dans le " premier cas, l'énonciation fait pleine foi entre les parties, tout autant que la " disposition principale. C'est que, en effet, ce caractère de l'énonciation est tel

" alors, qu'il ne permet pas d'admettre qu'elle ait passée inaperçue, et que l'autre " partie n'y ait pas adhéré.

" Ce qu'il faut craindre sans doute, quand il s'agit de ces sortes d'énonciations, " c'est que les effets, qu'on voudrait en faire résulter ne soient le fruit de l'erreur " ou de la surprise, parceque la partie qui les a laissés passer, sans protestation, " et à laquelle maintenant on les oppose, n'y aurait pas suffisamment arrêté son " attention et aurait pu n'en pas comprendre toute la portée."

Plus loin il ajoute:—" Mais si l'énonciation ne se rattachait par aucun rapport " direct, au fait juridique, qui forme l'objet principal de l'acte, elle a bien pu ne " pas attirer l'attention de la partie qui l'a laissée passer sans réserves au moment " de la rédaction de cet acte, parcequ'elle n'en apercevait pas l'importance, et " qu'elle n'avait à le contredire aucun intérêt pé et actuel.

" Ces énonciations donc ne font pas preuve. Seulement elles peuvent fournir, " entre les parties, un commencement de preuve par écrit."

Il n'y a donc pas de preuve de stipulation d'intérêts; il n'y a donc pas de preuve que le défendeur ait fait avec son créancier une convention le liant à payer des intérêts annuels aussi longtemps qu'il garderait les sommes d'argent qui lui avaient été prêtées. Il ne reste donc que l'aveu du défendeur qui est indivisible. Le défendeur a avoué être convenu de payer des intérêts au taux de huit pour cent, mais il a ajouté qu'il avait payé tous les intérêts qu'il était convenu de payer et chaque fois qu'il était convenu d'en payer. C'est là un aveu complexe, qui est indivisible, parce que le fait nouveau du paiement, ajouté à l'aveu de la convention de payer, est connexe à ce dernier; il est donc indivisible; cet autre fait nouveau et distinct, ajouté par l'avouant au fait allégué par les demandeurs, en a modifié et même éteint entièrement les conséquences juridiques: Demolombe vol. 30me, Nos. 514, 517, 518, 519 et 520; art. 1243 C. C. B. C.; Pothier, obligations, No. 832; Zacharie, Aubry et Rau, tome VI, page 341; Bonnier No. 356; Larombière tome 5, art. 1356, No. 17.

Il ne reste donc que les intérêts au taux fixé par la loi sur l'obligation du 7 janvier 1864. Le défendeur prétend qu'il a prouvé par témoin que ces intérêts ont été payés.

L'intérêt annuel sur l'obligation du 7 janvier 1864, s'élève à la somme de quinze piastres. Cette somme est entièrement distincte du capital et forme une créance nouvelle qui devient exigible chaque année. Chaque annuité d'intérêts forme des créances séparées et distinctes les unes des autres, ces créances pourraient être prouvées par témoin, et la libération de ces créances pouvait aussi être établie par la preuve testimoniale. La preuve du paiement de soixante-dix piastres fait en mars 1879, était légale quant à la portion de ce paiement qui avait pour objet les intérêts sur l'obligation du 7 janvier 1864. Le paiement de la dernière année d'intérêt fait présumer le paiement des intérêts des années antérieures; et d'ailleurs, la preuve de la quittance verbale quant aux intérêts sur l'obligation du 7 janvier 1879 est légale.

Quant au plaidoyer de prescription, il n'y a pas de doute possible, il doit être maintenu.

Per Curiam.—La cause Rice vs. Ahern, jugée par la Cour d'Appel, est applicable à l'obligation du 21 mars 1853, et à celle du 7 janvier 1864. Ces mots:

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le paiement devra se faire à une époque déterminée pour tout dommage à peine, &c., et ces autres mots : *le paiement serait fait à telle époque sans intérêts jusqu'alors*, équivalent également à une stipulation d'intérêts après l'échéance du *terme*. Dans les deux cas, les intérêts courent de l'échéance des obligations, sans qu'il soit besoin de mise en demeure.

La clause de l'obligation du 19 juillet 1866, portant que les obligations du 21 mars 1853 et du 7 janvier 1864 produiraient des intérêts au taux de huit pour cent, peut servir non-seulement comme commencement de preuve, mais encore fait preuve complètement par elle-même de son contenu, *plene probat.*

Larombière 4me vol. art. 1320, No. 1, page 269 s'exprime comme suit : " Ces " simples *énonciations* (mentions, reconnaissances ou relations), et c'est ce qui les " caractérise, sont purement *unilatérales* au moins dans leur expression : elle sont " faites sans que l'autre partie y *consente*, y *adhère*, en *prenne* ou en *donne acte* " par son acceptation formelle."

Plus loin il ajoute : art. 1320, No. 11, page 278 : " Mais il ne faut pas confondre " avec les simples énonciations qui ont un rapport plus ou moins direct à la dis- " position principale, les *constations*, *déclarations*, *reconnaissances* et actes destinés " à établir comme ayant une existence propre et indépendante, une disposition " obligatoire ou convention particulière. Ils constituent, en effet, autant d'actes " spéciaux, malgré l'unité de rédaction et de contexte, et, s'il est vrai que la " preuve d'un fait juridique puisse résulter de tout écrit, alors même qu'il n'a " pas été rédigé dans le but formel (et l'on pourrait dire principal) d'en constater " l'existence, il est incontestable qu'un acte, *intercalé et confondu à dessein* dans " un autre, *fait également foi* entre les parties comme s'il avait été l'objet d'une " rédaction distincte et séparée."

Quant au paiement, invoqué par le défendeur, il ne peut être établi par témoin, il excède cinquante piastres. Je suis d'opinion que le défendeur aurait pu prouver autant de paiements à compte, (ou en déduction) qu'il en aurait faits, pourvu que chacun fut audessous de cinquante piastres ; appliquant l'article 1237 de notre Code à la défense aussi bien qu'à la demande.

Le défendeur doit réussir sur son plaidoyer de prescription. Les intérêts se prescrivent par cinq années à compter de l'échéance, or les intérêts étaient payables le premier mars de chaque année. L'action a été intentée en janvier 1880, et les demandeurs doivent avoir jugement pour les cinq années échues respectivement le premier mars 1875, 76, 77, 78 et 79.

Marcadé Presc. sur article 2277, §5, No. 289, vol. 12, page 335.
Tropl. art. 2257, No. 802–13, page 437, note 4.
Cotelle 2, page 416. Art. 2236 C. C. B. C.

Mousseau & Archambault, pour demandeurs.
DeBellefeuille & Bonin, pour défendeur.

(J. A. B.)

SUPERIOR COURT, 1880.

MONTREAL, 31ST MARCH, 1880.

Coram PAPINEAU, J.

No. 416.

Laramée et al. vs. *Evans.*

HELD:—1. That in the Roman Catholic Church, of which the full, entire and free exercise is recognized by our laws, marriage is a spiritual and religious tie and a sacrament, over which the Superior Court has no jurisdiction.

2. That our law has not established the civil marriage ("*mariage civil*"), but that it gives civil effects to a religious marriage validly celebrated by *curés* and ministers regularly ordained according to the rites of their respective Churches, and authorised to keep registers of baptisms, births, marriages and burials.

3. That the Superior Court, where two Roman Catholics have been married by a Protestant minister, has the power to refer to the Roman Catholic Bishop of the diocese of the parties, the decision of the question of the validity or nullity of the spiritual and religious tie of their marriage, in order that, after his decision shall have been reported to the Court, it may pronounce upon the civil effects resulting from the validity or nullity of such tie.

4. That according to the jurisprudence of the country, the sentence of the Roman Catholic Bishop, regularly pronounced, and deciding as to the validity or nullity of the spiritual and religious tie of marriage between Roman Catholics, can and ought to be recognized by the Superior Court.

By this action the father of one Joseph Laramée, an interdict, and his curator, alleged that the said Joseph Laramée was born of Roman Catholic parents, baptized and brought up in the Roman Catholic Church, and had always belonged to it and fulfilled his duties as a good Catholic.

That the defendant Margaret Evans had also been born and baptized a Roman Catholic, and had always remained so.

That on the 28th of May, 1879, in the city of Montreal, in presence of a Protestant minister to wit, the Rev. L. N. Beaudry, the said Joseph Laramée and Margaret Evans contracted a pretended marriage.

That the publication of bans, required by law before the celebration of said marriage, was not made by the *curé* of the parties in any of the churches to which they belonged. That they had no dispensation from the publication of the bans from the Bishop of the Diocese of Montreal.

The plaintiffs concluded that the marriage be annulled, and that the plaintiff's demand be referred to the Bishop of the Diocese of Montreal for his judgment upon the validity, or otherwise, of the said marriage, and then to be referred back again for final judgment upon the said Bishop's report, as to the civil effects of the said marriage.

The defendant demurred to that part of the declaration which asked that the demand be referred to the Roman Catholic ecclesiastical authorities of the Diocese of Montreal, principally upon the ground that they had no power to pass upon a marriage celebrated by a Protestant clergyman.

PAPINEAU, J. Cette demande tend à faire déclarer nul, quant au lien et quant aux effets civils qui s'ensuivent, un prétendu mariage entre Marie Joseph Laramée et la défenderesse. Elle est rencontrée par deux défenses en droit qui seules pour le moment sont soumises à l'appréciation du tribunal.

Laramée et al. vs. Evans.

L'exposé des faits sera donc limité à ceux considérés utiles pour faire connaître la question de droit à décider :

D'après les allégués de la déclaration, les conjoints étaient tous deux depuis plus de six mois, avant la date de leur prétendu mariage, paroissiens catholiques romains, l'un de la paroisse de St. Jacques, et l'autre de la paroisse du St. Nom de Marie à Montréal.

Le mariage a été fait sans publications préalables de bans dans les paroisses respectives des parties ; sans aucune dispense valable des dites publications obtenue de leur évêque diocésain, hors la présence de leur propre curé et en présence d'un ministre du culte protestant, étant pasteur de la première église méthodiste française.

On allègue que le marié n'avait pas l'exercice de ses facultés mentales à un degré suffisant pour donner un consentement libre et suffisant au mariage, qu'il a été entraîné à consentir à ce mariage par l'influence acquise sur son esprit faible par la défenderesse ;

Que celle-ci était mineure et sans tuteur *ad hoc* pour autoriser son mariage, et que sa mère était une femme dégradée ; enfin que subséquemment au mariage on a fait interdire le marié, on lui a fait nommer un curateur qui a été autorisé en justice à prendre la présente action.

Les conclusions demandent que le dit prétendu mariage soit déclaré nul comme ayant été invalidement, abusivement et clandestinement contracté et sans effet civil, et qu'après la preuve des faits à faire devant cette Cour ou de toute autre manière qu'il plaira au tribunal d'ordonner, " la présente demande soit " référée à l'autorité ecclésiastique catholique romaine du diocèse de Montréal, " c'est-à-dire à l'ordinaire du lieu, pour être sur icelle demande, prononcé sur la " valeur ou le défaut de valeur du prétendu mariage quant au lien (*quoad " fœdus*) et être ensuite la sentence du dit ordinaire rapportée devant cette Cour " pour être ultérieurement, par la dite cour, prononcé sur la valeur du dit pré- " tendu mariage, *quant à ses effets civils.*"

La première défense en droit s'attaque à cette partie des conclusions de la déclaration où les demandeurs demandent la référence à l'autorité ecclésiastique dans le but d'avoir sa décision sur la question de la nullité ou de la validité du lien de mariage existant apparemment entre les parties.

La défenderesse prétend que cette partie des conclusions de la demande ne découle pas des prémisses de celle-ci pour des raisons qui peuvent se résumer ainsi :

1. La Cour ne peut pas et ne doit pas l'accorder.

2. La décision de cette matière ne peut pas être référée à l'autorité ecclésiastique catholique romaine ou à l'ordinaire du diocèse, qui n'a aucun pouvoir de prononcer sur ce mariage célébré par un ministre protestant.

On voit par le seul exposé de ces prétentions qu'elles sont, de fait, une exception à la juridiction de cette Cour et à la juridiction de l'évêque, plutôt qu'une défense en droit.

Quant à la seconde défense en droit, elle s'attaque à une partie seulement des allégués. Mais les allégués que l'on veut faire rejeter, bien qu'ils soient insuffisants, pris isolément, pour le maintien de l'action, se relient, et se rattachent à

d'autres allégués de la déclaration et peuvent servir à les expliquer et à les corroborer ; ce sont des circonstances accessoires qui peuvent donner plus de consistance et même de raison d'être à l'action des demandeurs.

Nous pourrions, sans autres observations, renvoyer les deux défenses en droit. Cependant les parties ont paru désirer beaucoup avoir l'opinion de la Cour sur la question même, qui les intéresse particulièrement : celle du pouvoir de cette Cour de référer la question à l'autorité ecclésiastique catholique romaine, du pouvoir de celle-ci sur la matière qui lui serait soumise. Nous ajouterons donc les considérations suivantes.

Le mariage connu de nos jours sous le nom de "mariage civil" est inconnu à notre législation, quoiqu'elle soit faite pour répondre aux besoins d'une population composée de familles appartenant à un grand nombre de congrégations de croyances religieuses différentes.

L'esprit de notre législation est si sage cependant que si l'on veut s'en pénétrer bien, chacun peut suivre sa foi et observer la loi civile, sans porter ombrage aux droits de ceux qui ont une foi différente de la sienne.

Cela vient de ce qu'en matière de foi, chez nous, la loi civile ne fait sentir son action que pour conserver, autant que possible, à chacun une juste liberté, et l'empêcher d'empiéter sur les droits d'autrui.

Notre loi ne connaissant pas le mariage civil proprement dit se contente de donner des effets civils et sa sanction au mariage religieux.

Elle a adopté comme très sages les précautions et formalités prescrites dans l'Eglise pour assurer la publicité et la moralité des mariages. Elle n'établit pas de fonctionnaires de création particulière ayant en son nom seul le droit de marier indistinctement les personnes appartenant à toutes les croyances.

Elle reconnait plutôt qu'elle ne confère ce droit aux prêtres, curés, ministres et autres fonctionnaires, désignés dans chaque église par une ordination régulière, et elle les autorise à tenir les registres de l'état civil.

Les publications ordonnées sont faites par le prêtre, ministre ou autre fonctionnaire, dans l'église à laquelle appartiennent les parties, au service divin, à trois dimanches ou jours de fête.

La loi ne dit pas que tel prêtre, ministre ou autre fonctionnaire se transportera d'une église à l'autre appartenant à des congrégations différentes, si les parties appartiennent à des croyances différentes. Ces publications ont lieu dans l'église de chacune de ces parties et, tout naturellement, par le ministre de cette église.

La loi reconnait un certain nombre d'empêchements au mariage, ceux qui sont admis par toutes ou presque toutes les églises qui se partagent le soin de pourvoir aux besoins spirituels des habitants du pays (C.C. Art. 124, 125 et 128.)

Quant aux autres admis, d'après différentes croyances religieuses, comme résultant de la parenté ou de l'affinité *et d'autres causes*, ils restent soumis, non pas à l'autorité civile ou à des fonctionnaires de sa création spéciale, mais "*aux règles suivies jusqu'ici dans les diverses églises et sociétés religieuses.*" (Art. 127.)

"Il en est de même quant au droit de dispenser des empêchements, lequel

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"appartiendra tel que ci-devant à ceux qui en ont joui par le passé." Nous avons dit que la loi civile n'a pas créé de fonctionnaire particulier ayant expressément d'elle le droit de marier les personnes appartenant à toutes les croyances indistinctement.

Dès le commencement de l'établissement du pays, les colons ont apporté avec eux, le droit existant alors en France ét en vertu duquel les évêques catholiques, et les prêtres par eux autorisés, avaient seuls le pouvoir de célébrer les mariages. Subséquemment ce pouvoir a été étendu successivement par notre législature aux ministres des congrégations religieuses venues d'Europe où qui ont pu prendre naissance en Amérique, mais ce pouvoir ne leur a pas été étendu pour l'exercer sur tous ceux qui se présenteraient sans distinction des croyances de ceux-ci. Il ne leur a été donné pour l'exercer que sur les personnes appartenant à leur croyance.

Ceci n'est pas dit en toutes lettres, dans les articles du Code qui attribuent aux prêtres et ministres leurs pouvoirs (art 128 et 129), mais s'infère des autres dispositions du Code mises en concordance avec celles-ci et de l'état de la législation existant avant le Code, et que celui-ci n'a pas changée.

Il est bien certain qu'il existe, dans certaines églises ou sociétés religieuses, des empêchements au mariage qui ne sont pas considérés tels par d'autres églises.

La loi civile, en laissant ces empêchements soumis aux règles suivies dans chaque église, a naturellement dû laisser l'appréciation de tels empêchements à l'autorité constituée dans telle église. Comment en effet un ministre ou fonctionnaire d'une église étrangère considèrerait-il comme pouvant ou devant l'empêcher de célébrer le mariage un fait ou une cause que sa foi n'admettrait pas être un obstacle à tel mariage? Il ne s'y arrêterait pas, il n'y penserait même pas et procéderait au mariage.

Cela pourrait avoir des conséquences graves, dans la pratique, et créer, entre les différentes congrégations, des animosités déplorables que la loi a précisément pour but d'éviter.

Si un fonctionnaire appartenant à une église avait le droit de marier deux personnes d'une autre église, il pourrait tout aussi bien prétendre au droit d'aller faire, dans leur église, pendant le service divin et malgré celui qui célébrerait le service, les publications prescrites, car le pouvoir de faire les publications est attribué aux mêmes personnes et dans les mêmes termes que le pouvoir de célébrer les mariages, et si les parties au mariage appartiennent à différentes églises, ces publications ont lieu dans les églises de chacune (C. C. art: 129 et 130).

La bonne harmonie qui existe aujourd'hui entre nos diverses sociétés religieuses serait bientôt brisée, si le ministre de l'une avait la prétention de publier et célébrer les mariages des personnes de croyances différentes dans les églises de ces personnes, et sans tenir compte des empêchements particuliers à chaque croyance.

Aucune disposition du Code n'autorise expressément une pareille manière d'agir et pour cause. Et le bon sens des ministres des différentes croyances les a heureusement gardés, jusqu'à présent, contre la tentation de réaliser ces prétentions exagérées.

Si d'un autre côté l'on examine tous les statuts de l'ancienne province du Bas-Canada, ceux du Canada avant la Confédération, et ceux de la province de Québec, par lesquels il a été permis aux ministres des diverses églises et congrégations religieuses de célébrer des mariages et de tenir régistres des baptêmes, mariages et sépultures, on trouvera que tous ces statuts contiennent, soit dans leur titre, soit dans leur préambule, soit dans leurs dispositions, des expressions démontrant que ces statuts ont été passés, *pour le soulagement*, " *pour l'avantage et la satisfaction* " des congrégations qui les ont demandés, ou encore que ces régistres seront " *tenus pour l'usage de ces congrégations.*"

Quelques-uns de ces statuts contiennent toutes ces expressions à la fois et ils exigent que le ministre soit " régulièrement ordonné," suivant les rites de son église, avant d'avoir le pouvoir de tenir tels régistres.

Pourquoi cela, sinon pour assurer, à chaque société religieuse, l'avantage d'être traitée suivant les règles de sa foi, et que les mariages, baptêmes et sépultures de ses membres seront faits suivant les rites de son église?

C'est en effet le meilleur moyen d'assurer la paix et la tranquillité des familles, suivant l'expression du préambule de la 35ème Geo. 3, chap. 4.

Les statuts suivants: 3 Guill. 4, ch. 29; 4 Guill. 4, ch. 19; 4 Guill. 4, ch. 20; 9 Geo. 4, ch. 75; 6 Guill. 4, ch. 50; 2 Vict., ch. 17; 1 Guill. 4, ch. 56; 3 Guill. 4, ch. 28; 6 Guill. 4, ch. 49; 3 Guill. 4, ch. 27; 9 Geo. 4, ch. 76; 8 Vict., ch. 35; 9 Vict., ch. 54; 13 et 14 Vict., ch. 47; 16 Vict., ch. 216; 16 Vict., ch. 217; 18 Vict., ch. 58; 18 Vict., ch. 59; 20 Vict., ch. 214; 23 Vict., ch. 11; 31 Vict., ch. 55; 36 Vict., ch. 16, sect. 1 et 2; 40 Vict., ch. 55 sec. 8; 41 Vict., ch. 8, sect. 3; 41 Vict., ch. 39, sect. 3, et 42-43 Vict., ch. 68, sect. 3, se rapportent tous à cette matière de la tenue des régistres et de la célébration des mariages par les ministres des différentes églises, et tous contiennent quelqu'une des expressions limitatives déjà citées.

Inutile d'établir ici que la religion catholique romaine et son plein, entier et libre exercice ont été reconnus dans ce pays et garantis par la foi des traités confirmés par l'acte impérial de 1774, si souvent cité, devant nos tribunaux, sous le nom " d'Acte de Québec." La plus forte partie de notre législation civile se rattache à ce fait et en est la conséquence nécessaire.

Or un des principes fondamentaux de cette église est que le mariage n'est pas simplement un contrat, un lien civil, mais un lien spirituel, indissoluble et un sacrement; sacrement que l'évêque seul et ceux qui le représentent peuvent administrer; un lien auquel cette église a mis des empêchements dont l'évêque seul peut dispenser, des empêchements tels que ceux qui, s'y trouvant sujets, contractent une alliance sans en avoir obtenu dispense, sont réputés concubinaires.

Le juge civil n'a pas jurisdiction sur le sacrement ni sur le lien religieux. Cependant la loi donnant des effets civils au mariage contracté suivant les lois de l'église catholique, comme elle le fait d'ailleurs pour les mariages célébrés avec son assentiment par un ministre d'une autre église régulièrement ordonné suivant les rites de cette autre église, il importe grandement aux intéressés de faire décider si leur mariage est valide ou non suivant la loi de leur église respective. Pour en arriver là il faut nécessairement s'adresser à l'autorité ecclésiastique compétente, dans chaque église, s'il y a une telle autorité constituée apparente.

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De cette manière la foi de chacun n'est pas froissée, sa liberté religieuse est sauvegardée, et ses droits civils ne sont pas lésés. Dans le système contraire, où l'autorité civile entreprendrait de trancher et le lien de droit civil et le lien religieux ou seulement le lien civil, sans égard au lien religieux, on s'exposerait à faire des concubinaires, religieusement parlant, de personnes légalement mariées aux yeux de la loi civile.

Un résultat si déplorable doit et peut être évité en laissant l'autorité spirituelle agir dans sa sphère et même en l'appelant à rendre ses sentences au besoin, afin que l'autorité civile n'ait, de son côté, à se prononcer que dans les limites de ses attributions spéciales. C'est en agissant ainsi de concert, et chacune dans la sphère qui lui est propre, que les deux autorités ont toujours concouru si efficacement, et si harmonieusement, dans notre pays, à promouvoir le bien être temporel et spirituel des populations dans l'érection civile et canonique des paroisses, et dans la construction des édifices destinés au culte public et autres matières semblables.

On a objecté qu'il n'y a pas de cour ecclésiastique régulièrement établie et reconnue par la loi, dans le pays; c'est vrai, mais cela n'est pas nécessaire. L'évêque est toujours le " juge ordinaire," en matière ecclésiastique, lorsqu'il n'a pas nommé d'official pour agir à sa place. Et son autorité, sous ce rapport, a été signalée, par le plus haut tribunal de l'empire, dans les termes suivants, d'après le rapporteur du Conseil Privé dans la cause de Guibord : " It must, " however, be remembered that a Bishop is *always a judex ordinarius*, according " to the canon law; and, according to the general canon law, may hold a Court " and deliver judgment if he has not appointed an official to act for him. " And it must *further be remembered* that, *unless such sentences were recognized*, " *there would exist no means of determining* amongst the Roman Catholics of " Canada the many questions *touching faith and discipline* which, upon the " admitted canons of their church, may arise amongst them." (3 Revue Critique page 490.)

Une des raisons alléguées par les demandeurs, contre la validité du mariage en question, est qu'il n'a pas été précédé des publications requises, ou d'une dispense régulière des publications; qu'il n'a pas été célébré par le *propre curé* des parties; et qu'il en résulte un empêchement tel que le mariage serait radicalement nul.

Qui va décider s'il y a réellement un vice radical? Est-ce le juge civil? Mais ne pourrait-il pas lui arriver, ce qui parait être arrivé au ministre qui a célébré le mariage qui nous occupe, d'ignorer qu'il y avait réellement là un empêchement au mariage, et de passer outre et de déclarer parfaitement régulier ce que l'église déclarerait peut-être parfaitement nul, d'après le droit canon?

La défenderesse prétend que la Cour n'a pas le pouvoir de référer à l'évêque la décision de la validité du mariage en question.

Par la loi, cette Cour est revêtue de tous les pouvoirs nécessaires à la bonne administration de la justice, dans les causes d'une nature civile, et elle " a le pouvoir de rendre et accorder tous et tels moyens qui seront nécessaires pour effectuer et mettre à exécution les jugements qu'elle pourra rendre dans les matières susdites, ainsi que la loi et la justice en ordonneront," (Stat. R. B.

C., ch. 78, sect. 3 et 6). Et l'article 21 du Code de Procédure Civile nous dit que toute procédure adoptée qui n'est pas incompatible avec les dispositions de la loi ou de ce Code doit être accueillie et valoir, lorsque ce Code ne contient aucune disposition pour faire valoir ou maintenir un droit particulier ou une juste réclamation. N'arrive-t-il pas fréquemment que le juge est appelé à rendre des jugements sur des matières qui demandent des connaissances toutes spéciales et que des personnes, versées dans certaines sciences ou dans certains arts, seules peuvent apprécier justement? Que fait le juge alors? Il appelle ces personnes à son secours, ou soumet à leur appréciation ce qui est plus particulièrement du domaine de leur spécialité.

Dans la présente cause il se présente une question d'ordre spirituel qu'il est incompétent à juger (vu que sa juridiction est purement civile), mais de la détermination de laquelle dépendent des droits qui tombent sous sa juridiction. Ne peut-il pas et ne doit-il pas en référer, je ne dirai à un expert compétent mais à une autorité compétente dans cette matière? à l'évêque même que le droit canon nous désigne comme juge ordinaire? Je n'y vois aucun doute, surtout en face des autorités déjà citées et de notre droit commun.

Cela s'est déjà pratiqué ainsi, dans la cause de Lussier contre Archambault (11 L. C. Jurist, p. 53) décidée par les Juges Rolland, Day et Smith, le 14 juillet 1848, et dans la cause de Vaillancourt contre Lafontaine (11 L. C. Jurist, p. 305) décidée par M. le Juge Polette.

Dans la cause de Mignault contre Hapeman, décidée par M. le Juge Badgley, on n'a pas procédé par référence, mais on a appelé un des dignitaires de l'Eglise à établir qu'il y avait deux empêchements entraînant la nullité radicale du mariage alors en question; et la Cour prononça, en conséquence, qu'il était nul et fit défense au parties de prendre respectivement la qualité de mari et femme.

Dans cette dernière cause, telle qu'elle est rapportée (10 L. C. Jurist, p. 137), la question de la référence n'a pas été jugée contradictoirement, elle ne parait pas avoir été soulevée du tout.

Dans la cause de Burn et al. contre Fontaine, décidée par M. le Juge Torrance, le 1er de mai 1872, (4 Revue Légale p. 163), la question de référence n'a pas été soulevée non plus. Mais si le rapport de cette cause est exact, la Cour y aurait décidé de fait, sans que cela soit expressément dit dans le jugement, qu'un mariage entre deux catholiques romains, autorisé par une licence, et célébré par un ministre protestant, est légal.

On a cité comme définitive et fixant la jurisprudence, la cause de Dorion contre Laurent, jugée le 15 de janvier 1843, par la Cour du Banc de la Reine, en appel (17 L. C. Jurist p. 324). D'après le rapport, tel qu'il est fait, nous ne voyons pas que la question de référence ait été mentionnée, ni devant la Cour de première instance ni devant la Cour d'Appel. Nous considérons donc la question comme encore ouverte et attendant une solution de nos tribunaux.

La défenderesse a particulièrement insisté, pour repousser la demande de référence à l'évêque catholique, sur le fait que le mariage entre Laramée et la défenderesse aurait été célébré par un ministre protestant sur lequel l'évêque catholique n'aurait aucune juridiction.

Les catholiques, comme tels, sont, de fait et de droit, soumis à la juridiction

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de leur évêque pour tout ce qui est de la doctrine et de la discipline dans leur église. Le fait que par une infraction à la loi de leur église, ils se présenteraient devant un ministre d'une autre église, ne peut pas les soustraire au jugement de l'autorité chargée de mettre cette loi en vigueur. Le délit même qui rend un délinquant sujet aux peines de la loi ne peut pas être la raison de son affranchissement de l'autorité chargée de veiller à l'exécution de cette même loi.

Les deux premiers plaidoyers de la défenderesse, par elle intitulés défenses en droit, sont renvoyés avec dépens.

The judgment is *motivé* as follows :—

"Considérant que les raisons ou moyens opposés à une partie des conclusions de la demande en cette cause par la défenderesse dans sa première défense en droit sont des moyens d'exception à la juridiction de cette Cour, et à la juridiction de l'évêque catholique romain, plutôt que des raisons ou moyens de défense en droit, et qu'ils ne peuvent pas faire maintenir celle-ci ;

"Considérant d'ailleurs que pour adjuger sur le mérite de la dite prétendue défense en droit, la Cour doit considérer comme admis les allégués de la demande, et spécialement que lors de leur mariage les deux parties appartenaient à l'Eglise catholique romaine et résidaient depuis plus de six mois l'une dans la paroisse de Montréal (du St. Nom de Marie) et l'autre dans la paroisse de St. Jacques, dans le diocèse de Montréal ; que les publications des bans, antérieures au dit mariage, n'ont pas été faites par les curés des parties, et qu'elles n'ont pas obtenu de dispense de l'évêque de Montréal, seule autorité compétente pour accorder, dans l'Eglise catholique, dispense de telles publications, et que le dit mariage est clandestin, et atteint d'un vice, ou empêchement qui le rendrait radicalement nul aux yeux de la dite église ;

"Considérant que dans la croyance de cette église il existe des empêchements au mariage résultant de causes autres que celles énumérées dans les articles 123, 124 et 125 du Code Civil, et que ces empêchements sont soumis aux règles suivies jusqu'ici dans la dite église aux termes de l'article 127 du Code, et que parmi ces empêchements sont ceux invoqués par les demandeurs ;

"Considérant que dans la religion catholique romaine dont le plein, entier et libre exercice est reconnu par nos lois, le mariage est un lien spirituel et religieux et un sacrement sur lesquels cette Cour Supérieure n'a aucune juridiction, vû qu'elle ne doit connaître que des causes d'une nature purement civile ;

"Considérant que notre loi n'a pas établi le "mariage civil," mais qu'elle donne des effets civils au mariage religieux validement célébré par les curés et ministres régulièrement ordonnés suivant les rites de leurs églises respectives, et autorisés à tenir des régistres de baptêmes, naissances, mariages et sépultures ;

"Considérant que cette Cour a le pouvoir de référer à l'évêque catholique romain du diocèse des parties la décision de la question de la validité ou de la nullité du lien spirituel et religieux de leur mariage, pour après avoir pris connaissance de la sentence de l'évêque sur telle question, ordonner ce que de droit quant aux effets civils résultant de la validité ou de la nullité de tel lien ;

"Considérant que d'après la jurisprudence du pays, la sentence de l'évêque

régulièrement prononcée et décidant de la validité ou de la nullité du lien spirituel et religieux de mariage entre catholiques, peut et doit être reconnue par cette Cour ;

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" Considérant que les allégués de la déclaration sont suffisants pour permettre aux demandeurs de prendre les conclusions auxquelles s'attaque la dite première défense en droit, et que celle-ci est mal fondée, la Cour la renvoie avec dépens contre la défenderesse."

Demurrer dismissed.

Bonin, Archambault & Archambault, for plaintiffs.
Trenholme, Maclaren & Taylor, for defendant.
(J.L.M.)

SUPERIOR COURT, 1880.

MONTREAL, 30TH JUNE, 1880.

No. 854.

coram JETTE, J.

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HELD :—1. That the proprietor of an immoveable property hypothecated cannot lease this immoveable and receive the rents by anticipation, to the detriment of the rights of the hypothecary creditor.

2. That in such a case where the tenant pays the rents by anticipation, he may be condemned to pay them a second time.

3. That article 2129 of the Civil Code applies only to a third purchaser and not to a hypothecary creditor.

In this case the plaintiff, as assignee to the estate of one Noel Jubinville, an insolvent, alleged that on the 19th of February, 1876, the said Noël Jubinville acknowledged himself indebted to James Clyde *et al.*, under deeds of obligation and mortgage, in a sum of about £2450.0.0 sterling, for which he hypothecated a certain lot of land in St. Antoine ward, Montreal.

That while the said property was in the possession of said Noel Jubinville as proprietor, he leased a part thereof to defendant at the rate of $27 per month.

That said Noel Jubinville afterwards became insolvent, and his estate was placed in the hands of the plaintiff as official assignee.

That the said James Clyde *et al.* proved claims against said estate showing a balance then due to them of $608.94 for interest, besides the capital of their mortgages.

That on the 17th of January, 1879, the property was sold by the assignee for $11,100, but the proceeds of the sale were insufficient to pay the amount of the mortgages of James Clyde *et al.*

That during the period in which the said assignee was vested with said property defendant used and occupied said premises as lessee, but failed to pay any rent for his use and occupation, which amounted to $135.00.

Defendant pleaded that on the 27th of June, 1878, said Noel Jubinville leased by authentic lease before Decary, N. P., to defendant, for two years and ten months from the first of July then next, the said premises, and at the same time paid in advance to the said Jubinville the rent for the first ten months up

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to the 1st of May, 1879, amounting to $271.00, which included the period for which the plaintiff claimed rent from the defendant, who then prayed for the dismissal of plaintiff's action.

Plaintiff replied that the effect of the lease, so far as the insolvent was concerned, was merely a covenant to allow the defendant to use and occupy the premises, in which respect the assignee carried out the contract, but the ownership of the property became vested in plaintiff in his quality of assignee to said Jubinville's estate, and as an accessory of such ownership the right to enjoy the said property and the revenues thereof for the benefit of the creditors of said estate, of which rights the plaintiff could not be and was not deprived by the alleged payment by defendant in advance, which payment, if made, was at defendant's own risk and peril, and subject to the condition of the said Jubinville's continuing to be the owner of said property and having the right to allow the defendant to use the same, and the alleged payment in advance became and was by the said insolvency of Jubinville of no force or effect as regards the plaintiff and the creditors of said estate, and could not affect the right of plaintiff to recover said rent for the period during which the premises were occupied after said insolvency.

JETTE, J.—Le 27 juin 1877, *Noel Jubinville*, négociant de Vaudreuil, donne à bail au défendeur McClanaghan, partie d'un immeuble portant No. 877 au plan cadastral du quartier St. Antoine. Ce bail est fait pour deux ans et dix mois; du 1er juillet 1878, au 1er mai 1879, 10 mois, et ensuite du 1er mai 1879 au 1er mai 1881, 2 ans. Le loyer convenu est de $27 par mois pour les premiers 10 mois et $29.17 pour chaque mois des deux années suivantes. Le propriétaire *Jubinville* reconnait, au bail, avoir reçu le paiement du loyer des premiers dix mois, savoir $270.

Six semaines après, le 10 août 1878, Jubinville, le propriétaire, est mis en faillite.

Lors du bail, la propriété louée était hypothéquée à divers créanciers étrangers, (l'un résidant en Angleterre, et deux autres en Ecosse) pour une somme excédant la valeur réelle du dit immeuble.

Le 17 janvier 1879, le syndic ayant vendu cette propriété, elle ne rapporte en effet qu'une somme insuffisante pour payer les créanciers hypothécaires, à qui il reste dû environ $3000.

Afin de couvrir partiellement ce déficit ces créanciers se font autoriser à procéder au nom du syndic au failli *Jubinville*, contre le locataire McClanaghan, pour réclamer le paiement du loyer de la propriété en question pendant les 5 mois écoulés depuis la faillite jusqu'au 1er février suivant, savoir du 1er septembre 1878 au 1er février 1879.

Le locataire plaide le paiement qu'il a fait au propriétaire Jubinville lors du bail, pour les dix mois à courir alors, alléguant que les 5 mois réclamés font partie de ceux qu'il a ainsi payés au propriétaire, et qu'en conséquence il est libéré et ne peut être forcé de payer de nouveau.

Le demandeur ès-qualité répond que le bail invoqué n'était qu'une simple promesse de la part du propriétaire de permettre au locataire d'occuper l'immeuble baillé, mais que la propriété du dit immeuble ayant passé au demandeur

ès-qualité, par la faillite du propriétaire, le droit de jouir et d'occuper le dit immeuble, accessoire du droit de propriété, a pareillement été acquis au demandeur, et le paiement du loyer, par anticipation, a été fait aux risques et péril du locataire, et sous la condition du maintien du droit de propriété du locateur, et que, par la faillite, ce paiement est devenu sans effet quant au demandeur ès-qualité et aux créanciers du propriétaire failli.

Telle est la contestation entre les parties: et il est à remarquer que le demandeur n'allègue aucune fraude de la part du propriétaire ou de son locataire le défendeur, dans la stipulation de paiement de loyer par anticipation.

Le litige présente donc une pure question de droit, sans aucune circonstance pouvant modifier en quoi que ce soit l'application des principes.

Il s'agit de savoir:

Si le propriétaire d'un immeuble hypothéqué peut donner cet immeuble à bail et en recevoir les loyers, par anticipation, au détriment des droits du créancier hypothécaire?

De la part du défendeur on invoque l'art. 2129 du C. C., qui dit:

"Tout acte portant quittance de *plus d'une année* de loyer [illegible], "par anticipation, ne peut être opposé, à un *tiers-acquéreur* s'il n'a [illegible] "avec désignation de l'immeuble."

Par un argument *à contrario* le défendeur dit donc: puisque la quittance de *plus d'une année*, ne peut être opposée au tiers-acquéreur, il est évident que la quittance de *moins d'une année*, comme dans l'espèce, (10 mois) peut être valablement invoquée.

Mais cet argument qui pourrait être applicable au *tiers-acquéreur*, c'est-à-dire à celui qui a acquis l'immeuble du propriétaire, ne l'est pas au *créancier hypothécaire*. Il y a, en effet, une différence radicale entre la position du tiers-acquéreur et celle du créancier hypothécaire. Le tiers-acquéreur n'a que des droits subséquents à ceux du locataire; le bail existant déjà, lorsqu'il acquiert, la loi suppose qu'il a dû se renseigner, et s'il ne l'a pas fait, elle permet d'invoquer contre lui la quittance pour loyers d'une année ou moins.

Le créancier hypothécaire, au contraire, a des droits antérieurs à ceux du locataire; ces droits sont assurés, garantis sur la chose elle-même, son droit de préférence est réglé par la loi; tous droits subséquents acquis par le locataire ne peuvent donc préjudicier à ceux du créancier hypothécaire. Autrement l'hypothèque n'offrirait plus aucune garantie, aucune sécurité, et il serait au pouvoir du propriétaire de l'immeuble grevé d'hypothèque de diminuer à sa volonté la valeur du gage hypothécaire. Il y a plus, le droit qu'acquiert le locataire en vertu du bail, s'il n'est pas enrégistré, ne peut être qu'un droit *purement personnel*, et qui par conséquent, ne peut entrer en concours avec le droit du créancier hypothécaire; s'il est enrégistré, il ne peut compter, à tout événement, que de la date de son enregistrement, et il ne peut encore être opposé au droit du créancier hypothécaire antérieur.

Dans l'espèce, le bail a été enrégistré, mais le 25 juillet 1878, c'est-à-dire moins de 30 jours avant la faillite du propriétaire. Cet enregistrement ne peut donc être invoqué comme créant un droit réel, opposable aux autres créanciers hypothécaires.

Dupuy es qual. vs. McClanaghan.

La position du défendeur qui a payé d'avance 10 mois de loyer, est donc vis-à-vis des créanciers hypothécaires, simplement celle d'un créancier chirographaire qui a avancé de l'argent sans prendre de garanties pour s'en assurer le remboursement.

Dans ces circonstances, l'action étant prise par les créanciers hypothécaires, au nom du syndic, mais dans leur propre intérêt, je suis d'avis que le paiement anticipé de loyer que le défendeur a fait imprudemment ne peut leur être opposé.

Le défendeur aura son recours contre la faillite comme créancier chirographaire, pour ce qu'il a payé au failli, mais il ne peut jouir de l'immeuble hypothéqué au détriment de ceux à qui il était engagé pour plus que sa valeur.

Le demandeur ès-qualité, doit donc avoir jugement pour la somme demandée.

Autorités :

Voir 3 Aubry et Rau, § 286, p. 427, 430, 434 ; texte et notes, 21, 22, 25, 26.

Revue Crit. de Législation, 1854, 1re partie, p. 160 et suiv., art. de Paul Pont, p. 164.

Acte de faillite, sec. 16.

C. C. 1639, 1663, 1664, 2090, 2128, 2129.

Troplong, Louage Nos. 539, 540.

NOTE.—Nous n'avons pas l'article 684 du C. de Proced. français ; au contraire dans notre droit le *saisi* reste en possession jusqu'à l'adjudication ; C. P. C. 645.

Néanmoins dans l'espèce, la faillite a transmis la propriété immédiatement au syndic. Donc le locataire n'a plus droit de jouir sans payer.

The following is the judgment of the Court :

" La Cour, etc.

" Considérant que le demandeur ès-qualité de syndic duement nommé à Noel Jubinville, failli, ci-devant négociant de Vaudreuil, et propriétaire de l'immeuble ci-après décrit savoir..... .....réclame du défendeur la somme de $135. pour cinq mois de loyer de partie du dit immeuble, du premier septembre 1878 au premier février 1879, à raison de $27 par mois, le dit immeuble loué au défendeur par le dit failli le 27 juin 1878, et dont la propriété a passé par l'opération de la loi de faillite au dit demandeur ès-qualité dès le moment de la faillite du dit propriétaire, savoir le 10 août 1878 ;

" Considérant que la dite action a été ainsi prise au nom du demandeur ès-qualité par James Clyde *et al.*, en leur qualité de créanciers ayant hypothèques duement inscrites sur l'immeuble sus-décrit, en vertu d'une autorisation spéciale à eux donnée à cette fin, conformément aux dispositions de la loi de faillite ; les dits créanciers alléguant que l'immeuble sus-décrit, affecté à leur garantie, a été vendu par le syndic et n'a rapporté qu'une somme insuffisante pour payer leurs hypothèques, et qui les laisse à découvert d'une somme de $3000, et que le défendeur, comme locataire et occupant du dit immeuble pendant la période susdite, est tenu d'en payer la jouissance et occupation ;

" Considérant que le défendeur plaide en réponse à cette action que par le bail que le failli Jubinville lui a consenti du dit immeuble le 27 juin 1878, il a été reconnu que lui, le défendeur, avait payé d'avance au propriétaire Jubinville

tout le loyer à échoir de la date du dit bail au premier de mai 1879, et qu'en conséquence, il ne peut maintenant être tenu de payer ce même loyer une seconde fois ; Dupuy es qual. vs. McClanaghan.

" Considérant que le créancier hypothécaire a, sur l'immeuble hypothéqué, un droit préférentiel pour le paiement de sa créance, qui ne peut être affecté par aucune convention subséquente faite par son débiteur ;

" Considérant que le bail d'un tel immeuble avec paiement de loyer par anticipation, si tel paiement pouvait être opposé au créancier hypothécaire, aurait pour effet de diminuer le gage de celui-ci sans son consentement ;

" Considérant que le locataire qui prend à bail un immeuble hypothéqué et qui en paye le loyer d'avance n'obtient sur icelui, pour assurer la jouissance représentant la somme de loyers avancés qu'une créance chirographaire, s'il ne stipule pas d'hypothèque ; et n'obtient qu'une hypothèque inférieure en rang à celle des créanciers déjà inscrits, dans le cas contraire ; et que dans l'un et l'autre cas il ne peut venir en concours avec ceux qui le priment ;

" Considérant que l'hypothèque des créanciers en cette cause remonte au 19 février 1876 ;

" Considérant au contraire que le défendeur en cette cause n'a enrégistré son bail que le 25 juillet 1878, c'est-à-dire moins de trente jours avant la faillite du propriétaire, et, que par suite, il ne peut réclamer aucun droit privilégié sur le dit immeuble ; que néanmoins la jouissance d'icelui, sans payer de loyer, constituerait tel privilége au détriment des créanciers hypothécaires du failli ;

" Vu l'article 2090 du Code Civil ;

" Considérant que l'article 2129 ne s'applique qu'au tiers-acquéreur et non au créancier hypothécaire ;

" Considérant, en conséquence, que le paiement par anticipation de dix mois de loyer, fait par le défendeur au failli, ne peut préjudicier aux droits des créanciers hypothécaires duement inscrits sur le dit immeuble, et que ceux-ci sont bien fondés à réclamer le paiement du loyer, nonobstant tel paiement, que le défendeur a fait à ses risques et périls ;

" Renvoie l'exception et défense du défendeur, et le condamne à payer au demandeur ès-qualité la dite somme de $135 cours actuel, avec intérêt à compter du 27 mars 1879, jour d'assignation, jusqu'au paiement, et les dépens distraits à Messrs. Abbott, Tait, Wotherspoon & Abbott, avocats du demandeur ès-qualité."

Judgment for plaintiff.

Abbott, Tait, Wotherspoon & Abbott, for plaintiff.
Doherty & Doherty, for defendant.
(J. L. M.)

COUR DU BANC DE LA REINE, 1877.

MONTREAL, 15 JUIN 1877.

Coram DORION, J. C., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 152.

FRANCOIS XAVIER GAREAU,

(*Demandeur en Cour de première instance*),

APPELANT;

ET

CHARLES GAREAU,

(*Défendeur en Cour de première instance*),

INTIMÉ.

JUGE:—Que l'une des parties à un contrat simulé et frauduleux et qui a participé à la fraude, n'est pas recevable à demander la révocation de ce contrat, lors même que ce serait contre celui des contractants qui le premier a voulu consommer la fraude projetée; en un mot, qu'on ne peut en invoquant sa propre turpitude, demander, en loi, la rescision du contrat auquel on a été partie.

L'action du demandeur appelant est intentée contre deux défendeurs: Charles Gareau, l'intimé, et Jules-Napoléon-Adolphe Mackay. Ce dernier n'a pas plaidé.

L'objet de la demande est de faire annuler, pour cause de simulation et de fraude, deux actes de vente passés, l'un, le 15 novembre 1861, et consenti par l'appelant au défendeur Mackay; l'autre, consenti le 23 février 1864, par le défendeur Mackay, à l'intimé Charles Gareau.

Il est allégué dans la déclaration en cette cause, que le 15 novembre 1861, l'appelant était en état de déconfiture complète et absolument incapable de payer ses créanciers. Il ne lui restait plus alors qu'un immeuble situé sur la rue St. Joseph, à Montréal.

Pour sauver du naufrage ce dernier débris de sa fortune, il s'entend avec le défendeur Mackay, son *beau-frère*, alors simple *étudiant en droit* et sans aucun moyen pécuniaire, pour lui passer sa propriété, afin de la mettre à l'abri des poursuites de ses créanciers.

L'acte du 15 novembre 1861 est en conséquence passé, et il y est stipulé que Mackay achète le dit immeuble pour et moyennant une somme de $1571, qu'il promet payer aux créanciers ayant hypothèque sur cette propriété.

Il était cependant formellement entendu et convenu entre l'appelant et Mackay, que cette vente n'était que simulée et faite dans le seul but de soustraire cet immeuble aux poursuites des créanciers de l'appelant, et qu'aussitôt que celui-ci serait débarrassé de ces poursuites, Mackay lui remettrait sa propriété.

En 1862, l'intimé, Charles Gareau, oncle de l'appelant, qui avait un jugement contre ce dernier, en outre d'une créance portant hypothèque sur l'immeuble en question, fait saisir cet immeuble. Mackay intervient alors et produit à l'encontre de cette saisie, une opposition fondée sur son titre du 15 novembre 1861.

L'intimé qui connaissait parfaitement l'entente qui existait entre l'appelant et son *beau-frère* Mackay, conteste cette opposition, alléguant que l'acte du 15 novembre 1861, sur lequel elle était fondée, était simulé et frauduleux, et il demande l'annulation de cet acte.

Cependant, bien qu'il connaisse les vices de ce titre, il va trouver Mackay, et après force sollicitations et promesses, et moyennant une somme de $50 qu'il lui paie comptant, il le décide à lui vendre le dit immeuble pour une somme nominale de $600. Cette vente est constatée par l'acte du 23 février 1864.

Quoiqu'il en soit, l'intimé Charles Gareau était tellement convaincu de l'invalidité de son acte d'acquisition et craignait tant d'être poursuivi par l'appelant, ou par quelques uns de ses créanciers, qu'il va le trouver aussitôt après avoir acheté et lui déclare à plusieurs reprises, que c'était pour lui conserver sa propriété qu'il l'avait acquise, qu'il n'y prétendait rien et la lui remettrait certainement.

De son côté, Mackay était si peu sûr de la validité de la vente par lui faite à l'intimé, qu'il se fait donner par ce dernier un écrit le garantissant contre toutes poursuites qui pourraient être instituées contre lui à raison de cette vente.

L'appelant allègue aussi que l'acte du 15 novembre 1861, par lui consenti à Mackay, était simulé et frauduleux, fait au détriment de l'appelant lui-même et de ses créanciers et pour un prix n'équivalant pas même à la moitié de la valeur du dit immeuble.

Il allègue de plus, que le second acte de vente, celui du 23 février 1864, par Mackay à l'intimé, était aussi un acte frauduleux et illégal, dont l'effet était de le dépouiller du seul bien qui pouvait lui permettre de payer ses dettes. Et pour toutes ces raisons, il conclut à l'annulation des deux actes sus-mentionnés.

L'intimé, Charles Gareau, a répondu à cette action par une *défense en droit* par laquelle il en demande le renvoi pour les raisons suivantes :—

1o. Parcequ'il appert à la face même de la déclaration, que le demandeur n'a pas droit d'action contre le défendeur Charles Gareau.

2o. Parcequ'il appert par la dite déclaration, que c'est le demandeur lui-même (et il l'allègue et l'invoque spécialement), qui a pratiqué la fraude dont il se plaint dans sa dite action.

3o. Parceque le demandeur ne peut être reçu à invoquer sa propre turpitude.

4o. Parceque les allégations de la déclaration, ne démontrent aucunement que le demandeur soit recevable à intenter contre le défendeur, l'action révocatoire.

En d'autres termes, continue l'intimé, la déclaration en cette cause démontre clairement que si aucune fraude a été commise au préjudice de l'appelant, c'est lui-même qui en est l'auteur : ce qui équivaut à dire qu'il s'est fraudé lui-même. Et invoquant la maxime : "*Propriam turpitudinem allegans non est audiendus*," l'intimé conclut au renvoi de l'action."

Cette *défense en droit* a été maintenue par la Cour de première instance (Torrance, J.) et ce jugement a été confirmé à l'unanimité par la Cour du Banc de la Reine.

Autorités de l'appelant :—

Chardon, Dol et Fraude, t. 2, No. 47 : "C'est une question sans cesse " renaissante, que celle de savoir si un des contractants est recevable à arguer " de nullité l'acte auquel il a participé. A ce sujet, il y a controverse entre les " jurisconsultes, et la jurisprudence des cours n'a pas encore acquis l'uniformité " désirable.

Ibid, No. 48 : " Une première règle à laquelle nous ne connaissons qu'une

Gareau et Gareau.

" seule exception, est qu'à *l'égard même des contractants, la simulation est une* " *cause de nullité radicale; et que chacun d'eux est recevable à l'attaquer* " CONTRE CELUI QUI VEUT CONSOMMER LA FRAUDE PROJETÉE, *ou s'en appro-* " *prier les effets par une seconde fraude*.....

" Sans doute celui qui, pour désobéir à la loi, a fait un contrat frauduleux, " est blâmable; mais *est-ce un motif raisonnable de se refuser à l'entendre* " lorsque le remord, ou le regret, le détermine à en demander la destruction? " EST-IL PLUS MORAL DE SATISFAIRE LE COMPLICE QUI PERSISTE DANS SA " FRAUDE ET DE PUNIR CELUI QUI SE REPENT, EN LAISSANT SA DEPOUILLE " A CELUI QUI EST INVARIABLEMENT PERVERS."

Arrêts confirmant l'opinion de Chardon:—

Journal du Palais, 1851, partie 2me, p. 541, jugé: " Que la partie qui a em- " prunté la forme d'un contrat dans une intention frauduleuse, notamment pour " soustraire ses biens aux poursuites de ses créanciers, *est recevable à en opposer* " *la simulation à l'autre partie qui prétend se prévaloir du contrat.*"

La même doctrine a aussi été consacrée par les arrêts suivants:—

Journal du Palais, 1827–28, p. 1188, Colmar, 19 fév. 1828.
Ibid: 1830–31, p. 914, Grenoble, 4 déc. 1830.
" 1831–32, p. 101, Lyon, 4 août 1831.
" " " p. 133, Cassation, 16 août 1831.
" 1851, 2me partie, p. 541, Limoges, 28 nov. 1849.
Sirey, 1828–30, 2me partie, p. 162, Bordeaux, 29 nov. 1828.
C. C. B. C., Arts. 989 et 990; C. Nap., Arts. 1131 et 1133.

Autorités de l'intimé:—

Axiômes du droit romain pour justifier le jugement dont se plaint l'appelant.
Aphorisme de droit; Fons., No. 131, *Nemini fraus sua patrocinari debet.*
Leg. penult., Cod. *de legat.*
No. 135, *Nemo videtur fraudare eos qui sciunt et consentiunt.* Leg. 145, § *de reg. jur.*
Sciens non fraudatur, dit Godfroy.
No. 136, *Nemo auditur propriam turpitudinem allegans.* Godfroy *ad leg.*, 5 *Cod. de serv. ping. dat.*

Cet auteur ajoute: " Celui qui a participé à la simulation d'un acte, ne peut " alléguer cette simulation pour le faire annuler. Personne ne peut alléguer sa " propre turpitude, alors surtout qu'une pareille allégation tendrait à préjudicier " à un tiers."

Chardon, Traité de la Fraude, vol. 3, No. 410, dit:—

" En un mot, lorsque les contractants sont également coupables, la position " de celui qui possède, dit la loi 8, est la meilleure, non en droit, mais en fait, " puisque quelque soit la position dans laquelle leur perversité les ait placés, la " JUSTICE LES REPOUSSE SANS VOULOIR ECOUTER NI L'UN NI L'AUTRE."

Ibid: vol. 1er., No. 16: " Enfin, une cinquième circonstance est requise, il " faut qu'il n'y ait eu dol que de la part d'un des contractants..... ..." Une loi romaine a prévu ce cas: " *Si duo dolo malo fecerint, invicem de dolo non* " *agent.* Loi 36, § *de dolo.*"

La même règle est posée par Bédarride, Traité du Dol et de la Fraude, vol. 1er, No. 263.

Ibid., vol. 3, No. 1417.

La même doctrine se retrouve aussi dans la jurisprudence anglaise.

Fisher's Harrison's Digest, vo. *Deed*, IX, *fraudulent and void*, p. 3013, rapporte plusieurs décisions dans ce sens: "*No man can be allowed to allege his own fraud to avoid his own deed.* Watts *v.* Brookes, 3 Ves. 613.

"*Therefore a deed of conveyance of an estate from one brother to another, was executed to give the latter a colourable qualification to kill game; held:* that AS AGAINST THE PARTIES TO THE DEED, *it was valid and was sufficient to support an ejectment* for the premises. Roberts *vs.* Roberts, 2 B. & A. 367."

Jugement de la C. S. confirmé.

Jetté, Béique & Choquet, pour l'appelant.

J. Ald. Ouimet, pour l'intimé.

(J. G. D.)

COURT OF REVIEW, 1880.

MONTREAL, 30TH JUNE, 1880.

Coram JOHNSON, J., JETTE, J., LAFRAMBOISE, J.

No. 1493.

Gagnon vs. *Sylva-dit Portugais.*

HELD:—1st. That the incapacity of a minor being established in his favor and not against him, the result of this incapacity is not that the minor cannot contract but only that he cannot be injured by his contract.

2nd. Where a minor is sued upon his contract he cannot be relieved from it by simply pleading his minority, but must plead and prove that he has been injured by the contract.

3rd. Although according to the terms of article 320 C. C. L. C. an emancipated minor cannot bring or defend a real action (*action immobili, re*) without the assistance of his curator, yet he can bring or defend an "*action mobilière*" without such assistance.

In this case a writ of *capias ad respondendum* issued against the defendant on the plaintiff's affidavit, which alleged that the defendant was indebted to the plaintiff in a sum of $50 for the price and value of a horse sold and delivered to defendant at Montreal, about the 8th of August, 1879.

The defendant petitioned to quash the capias, for the following amongst other reasons: Because the defendant was a minor, aged 18, at the time of the alleged sale.

This allegation of minority was proved, as well as the sale and delivery of the horse. It was also proved that, since the date of the sale, the minor had been married, and on the 30th December, 1879, the Superior Court rendered judgment rejecting the defendant's petition with costs.

The defendant inscribed this judgment for Revision, and the judgment of the Court of Review was rendered, confirming the same, on the 30th of June, 1880.

In answer to the defendant's allegation that he was a minor at the time of the purchase, the plaintiff pleaded and proved that defendant was then a trader, and cited arts. 322 and 323 of the Civil Code.

Garçon vs. Sylva dit Portugais.

JETTE, J., pronouncing the judgment of the Court, said:

Le 8 août 1879, le demandeur a vendu un cheval au défendeur, pour une somme de $50.

Le 30 octobre 1879, le demandeur a fait arrêter le défendeur sur *capias* pour cette somme de $50, alléguant que le défendeur recelait ses biens et les avait soustraits aux poursuites du demandeur son créancier.

La preuve établit d'une manière péremptoire le fait de la vente et celui du recel du cheval en question que le demandeur avait essayé de saisir les jours précédents.

Il ne peut donc y avoir de question quant aux faits de la cause; mais le défendeur allègue que lors de l'achat de ce cheval il était mineur et que par suite son obligation est nulle.

Cette prétention n'est pas soutenable. L'*incapacité* du mineur étant établie en sa faveur et non contre lui, le résultat de cette incapacité n'est pas que le mineur *ne peut contracter*, mais ne peut être lésé. "*Minor restituitur non tanquam minor, sed tanquam læsus.*"

Il ne suffit donc pas au mineur [illegible] sa minorité, il faut encore qu'il allègue et prouve qu'il a été lésé.

Cette prétention du défendeur est donc [illegible].

Mais une question plus forte pourrait se soulever ici, et le défendeur, sans l'invoquer formellement, cite dans son factum des autorités qui l'imposent à la décision de ce tribunal.

Le défendeur était mineur non émancipé lors de l'achat du cheval en question. Il est encore *mineur* aujourd'hui, mais *émancipé par mariage*.

Peut-il être poursuivi, peut-il ester en justice, sans l'assistance du curateur dont la loi veut qu'il soit pourvu?

J'avoue que la question me paraît très sérieuse: cependant l'art. 320 du C. C. paraît fournir, par un argument *a contrario*, une réponse à cette question. En effet puisque la loi déclare que le mineur émancipé ne peut intenter ou *défendre* à une action *mobilière* sans l'assistance de son curateur, il faut donc conclure, qu'il peut sans cette assistance répondre à une *action mobilière* comme la présente.

Et puisque le défendeur n'a invoqué ni la *lésion* en vertu de l'art. 1002, du C. C., ni demandé la réduction de son obligation, en vertu de l'art. 322, il est sans grief pour se plaindre du jugement qui l'a condamné en Cour de première instance.

Le jugement doit donc être confirmé avec dépens.

LAFRAMBOISE, J., concourt.

Judgment of S. C. confirmed.

Philéas Lanctot, for plaintiff.
Augé & Laviolette, for defendant.
(J. E. M.)

COUR SUPERIEURE, 1880.

MONTREAL, 30 JUIN 1880.

Coram JETTE, J.

No. 492.

Renaud vs. *Renaud*, & *Morin*, opposante.

1. Que la femme peut renoncer en faveur du créancier de son mari non seulement à son *douaire*, mais encore à tous droits hypothécaires qu'elle possède sur les biens du mari.

2. Que cette renonciation de la femme de sa priorité d'hypothèque sur les biens de son mari, en faveur du créancier de son mari, est légale, et ne constitue pas une obligation de la femme en faveur de son mari.

JETTE, J.—Sur saisie des biens immeubles du défendeur, sa femme produit une opposition afin de charge, alléguant que par son contrat de mariage en date du 16 octobre 18[illegible], elle a hypothèque sur l'immeuble saisi pour le paiement d'une rente de $200 par an, et pour la jouissance d'un appartement dans la maison construite sur cet immeuble. Elle demande, en conséquence, que la vente n'ait lieu qu'à la charge des droits qui lui sont ainsi garantis.

Le demandeur conteste cette opposition, attendu que la femme par l'acte d'obligation sur lequel repose la créance du demandeur a cédé priorité d'hypothèque pour le paiement de cette créance.

L'opposante réplique que cette renonciation constitue un cautionnement en faveur de son mari, et que par conséquent elle est nulle.

J'ai déjà maintenu, dans la cause de *Hogue & Cousineau et la Société de Construction Montarville*, conformément à ce qui me paraît être la jurisprudence du pays, que nonobstant les termes de l'art. 1444 du C. C., la femme peut renoncer, en faveur du créancier de son mari, non-seulement à son *douaire*, mais encore à tous *droits hypothécaires* qu'elle possède sur les biens du mari, que ces droits hypothécaires garantissent le remboursement de ses deniers dotaux ou autres avantages stipulés en son contrat de mariage. Cette doctrine s'applique par conséquent aux droits dont il est question dans l'espèce actuelle.

On objecte, cependant, de la part de l'opposante que la présente cause offre avec celles qui ont été déjà jugées cette différence que, dans les espèces précédentes, la femme était commune en biens avec son mari, tandis qu'ici elle est séparée de biens. Et l'on ajoute que la raison pour laquelle le législateur a permis la renonciation à la femme commune en biens, est que cette renonciation peut souvent tourner à son profit par l'avantage qui peut en résulter pour la communauté, tandis que la femme séparée de biens ne peut jamais avoir le même avantage, et sa renonciation constitue toujours une perte sans espoir.

Quelque ingénieux que puisse paraître ce raisonnement, je ne trouve rien qui le justifie.

Les dispositions par lesquelles notre droit protège la femme mariée contre les *cautionnements* qu'elle peut être tentée de prendre pour son mari, sont basées sur le Sénatus-Consulte Velléien, et les auteurs qui ont écrit sur cette loi fameuse ne font aucune distinction entre la femme commune et la femme séparée de biens. Ce que la loi a voulu, ça été d'empêcher la femme de s'*obliger* pour son mari, mais ce qui ne constitue pas une obligation ne lui est pas défendu. C'est pour-

Meunier vs. Renaud.

quoi la femme peut *payer* la dette de son mari, mais elle *ne peut emprunter* pour faire ce paiement.

Buckley et Brunelle (Cour d'Appel).

Mais comme la femme ne s'oblige pas en faisant remise de ses droits d'hypothèque, cette remise est valable. Telle est la jurisprudence de notre pays et celle que l'on trouve constatée, au 6e vol. des Pandectes de Pothier pp. 249 et 241.

Opposition renvoyée.

F. L. Sarrasin, pour l'opposante.
Archambault & David, pour le demandeur-contestant.
(J. L. M.)

SUPERIOR COURT, 1880.

MONTREAL, 30TH JUNE, 1880.

Coram JETTE, J.

No. 1571.

Corse vs. *Drummond*, & *Drummond*, Oppt.

HELD:—1. That the right which, under art. 630 of the Civil Code, ascendants have of resuming the property given by them to their descendants, is a right of succession or inheritance.
2. That such property can be seized for the debts of the succession of the donee.
3. That notwithstanding that the beneficiary heir is under art. 672 C. C., charged with the administration of the estate, nevertheless he may be sued directly, and the property of the succession attached by any creditor having an executory title.

JETTE, J.—Le 21 septembre 1867, M. le Juge Drummond a fait donation à son fils *William*, d'un immeuble situé dans la paroisse de Notre-Dame du Mont-Carmel (Dist. Trois Riv.).

Le 21 août 1876, M. *William D. Drummond* est décédé *intestat* et sans laisser d'enfant.

Ses frères et sœurs, et sa mère ont renoncé à la succession purement et simplement.

Son père, au contraire, a accepté, mais sous bénéfice d'inventaire.

En sa qualité d'héritier bénéficiaire, M. le Juge Drummond a été poursuivi par la demanderesse, pour une dette de son fils, et condamné à la payer sur sa propre confession.

En exécution de ce jugement, la demanderesse a fait saisir l'immeuble que M. Drummond, père, avait donné à son fils. M. Drummond s'oppose à cette saisie, alléguant:

Que l'immeuble en question lui appartient en vertu du droit de retour en faveur de l'ascendant donateur, reconnu par l'art. 630 du C. C.; que par conséquent il en est *personnellement* le propriétaire, et que cet immeuble ne peut être saisi pour les dettes de la succession de son fils.

Et l'opposant invoque au soutien de sa prétention, l'art. 672 du C. C., qui dit que l'héritier bénéficiaire ne peut être contraint *sur ses biens personnels*, qu'après avoir été mis en demeure de présenter son compte, et faute d'avoir satisfait à cette obligation.

Je ne crois pas que cette prétention de l'opposant soit bien fondée.

Le droit de retour établi en faveur de l'ascendant-donateur, aux choses par lui données, constitue un ordre de succession tout spécial ; mais une véritable succession, connue en droit sous le nom de succession *anomale*.

Cette doctrine est admise aujourd'hui par tous les auteurs.

2 Mourlon, Nos. 118, 119.

13 Demolombe, Nos. 481 bis, 482, 551, 552, 553.

L'ascendant, en vertu de ce droit de retour, est préféré aux autres héritiers du défunt quant aux choses par lui données, mais c'est toujours à *titre d'héritier* qu'il les reprend. Il est véritablement *successeur, héritier*, et par suite il est tenu aux obligations que cette qualité impose. Il est donc tenu des dettes, comme un successeur ordinaire, c'est-à-dire même *ultra vires*, à moins que, comme dans l'espèce actuelle, il n'ait obtenu *le bénéfice d'inventaire*.

Or quel est maintenant l'effet du bénéfice d'inventaire ? L'art. 671 nous le dit :

" L'effet du bénéfice d'inventaire est, de donner à l'héritier l'avantage :

" 1o. De n'être tenu au paiement des dettes de la succession que jusqu'à " concurrence de la valeur des biens qu'il a recueillis ;

" 2o. *De ne pas confondre ses biens personnels avec ceux de la succession*, et " de conserver contre elle le droit de réclamer le paiement de ses créances."

Le résultat des lettres de bénéfice d'inventaire obtenues par l'opposant a donc été simplement, quant à l'immeuble saisi, d'empêcher que cet immeuble soit confondu avec les *biens personnels* de l'opposant, mais non de faire de cet immeuble *un bien personnel* de l'ascendant-donateur. Cet immeuble est donc resté un bien de la succession, affecté au paiement des dettes.

Mais ne peut-on pas dire, invoquant l'art. 672, que puisque l'opposant a obtenu le bénéfice d'inventaire, il est devenu l'administrateur de la succession, le mandataire des créanciers eux-mêmes, et que c'est à lui et à lui seul à réaliser, à liquider, et par conséquent à vendre les biens pour en rendre compte ? Et que par suite les créanciers ne peuvent plus agir directement contre ces biens, mais doivent attendre la reddition de compte de l'héritier bénéficiaire ?

Cette question, plus controversée que la première, est cependant aujourd'hui décidée dans la négative, et l'on admet généralement que le créancier qui a un titre exécutoire, peut agir directement contre les biens de la succession, en dépit de l'héritier bénéficiaire.

15 Demolombe, No. 228.

Bilhard, Bénéf. d'Inv., Nos. 59, 61, etc.

Ces auteurs, et notamment Demolombe, répondent victorieusement à tous les arguments des partisans de la doctrine opposée.

L'opposition ne peut donc pas être maintenue.

The following is the judgment :

" Considérant que l'opposant, héritier bénéficiaire de feu Wm. D. Drummond, son fils, s'oppose à la vente de l'immeuble saisi en cette cause, alléguant que cet immeuble est un bien qui lui est personnel, attendu qu'il l'a recueilli dans la succession de son dit fils en vertu du droit de retour accordé par l'article 630 du Code Civil à l'ascendant-donateur, lorsque le donataire décède intestat, et sans enfant, et que, par suite, la demanderesse créancière de la succession du dit

Cerre vs. Drummond.

Wm. D. Drummond ne pouvant faire vendre les biens personnels du dit héritier bénéficiaire pour les dettes de la dite succession, la saisie du dit immeuble par la demanderesse est irrégulière et illégale ;

" Considérant que le droit de retour reconnu par l'article 630 du Code Civil constitue un véritable ordre de succession tout spécial, mais qui assujétit l'ascendant donateur qui s'en prévaut aux [illegible] obligations qu'un successeur ou héritier ordinaire, et que les [illegible] recueillie en vertu de ce droit de retour, le sont par le donateur à titre d'héritier et non autrement ;

" Considérant, en conséquence, que l'immeuble saisi n'est pas un bien personnel à l'opposant, mais un bien de la succession du dit feu William D. Drummond, recueilli par l'opposant comme tel en vertu du droit de préférence à lui accordé comme donateur sur tous les autres héritiers du défunt ;

" Considérant que l'effet du bénéfice d'inventaire obtenu par l'opposant n'a été que d'empêcher la confusion de cet immeuble de la succession avec les biens personnels de l'opposant, et ne peut empêcher les créanciers de la succession de poursuivre l'exécution de leurs créances sur les biens de la dite succession ;

" Considérant en conséquence que l'opposition du dit opposant est mal fondée ;

" Maintient la contestation de la dite opposition faite par les demandeurs et renvoie la dite opposition avec dépens."

Ritchie & Ritchie, for plaintiff.
L. U. Piché, Q.C., for opposant.
(J. L. M.)

Opposition dismissed.

COURT OF REVIEW, 1874.

MONTREAL, 21st OCTOBER, 1874.

Coram JOHNSON, J., MACKAY, J., TORRANCE, J.

The Molsons Bank vs. *McMinn*.

HELD:—1. That the intent to defraud required to constitute secretion must be an intent to defraud both the plaintiff in particular and the creditors in general, and not either of these alone.

2. That diverting the proceeds of a security pledged for the payment of a particular debt to the extinction of other liabilities is not a secretion such as will open the right to the process of *cap. ad resp.*

JOHNSON, J.—The defendant, McMinn, was arrested under a writ of *capias ad respondendum*, and on the 28th of August, he petitioned for his discharge on the ground of insufficiency in law of the affidavit, and that petition was rejected. Subsequently, on the 3rd of September, he petitioned on the ground of the untruth of the allegations in the affidavit, and upon the second petition judgment was given on the 15th September, quashing the writ and ordering the release of the defendant from custody. This last judgment is now [illegible] and the plaintiff who contested the petition for discharge before the judge below urged before us, first, that the question of law being disposed of by the first order, and the second petition not contesting the legal character or sufficiency of the affidavit, but only the truth of the facts that it alleges, the real question (which is

whether the circumstances disclosed establish secretion or not) is really not now before the Court. We do not take this view of the state of the case, because secretion, which is a question of law to be deduced from the state of the facts, was not the basis of the first application, but merely that it was not sufficiently alleged, and that the application rested mainly on the absence of specific allegations of the indebtedness of the individual arrested; and though there was no doubt on the first petition some confusion of fact and law, the order given upon it is not now under review; and the question now before us arises under the second petition, which contends that the affidavit charging secretion as a fact is untrue, and also that all the allegations of it tending to show that what the defendant did was really secreting his estate, debts, and effects, are untrue, and, therefore, that there was no secretion.

The facts are that the firm of Brown & McMinn got a loan of money from the plaintiffs. It was effected by the discounting of a note, whether through the instrumentality of a broker or not is immaterial. The other facts will be better taken from the affidavit itself.

[Here his honor read the allegations of the affidavit, which are in substance as follows: That the defendant gave as collateral security for the payment of the note a bill of lading of a quantity of wheat on board of a vessel called the Japan; that subsequently he got this bill of lading from the plaintiffs on the promise that he would use it to pay the amount of the note; but instead of doing so, he shipped the wheat on another vessel, and took a bill of lading which he pledged for another loan made by another bank, and took the money and applied it to the general purposes of his business and never repaid the plaintiffs. His honor then continued:]

We have before us, then, the case of a man who obtained from his creditors the security that he had given them for the payment of his debt under a promise to use that security for their benefit, and to pay them the money when he should get it, and who, instead of doing so, retained it for other purposes, leaving them without either the security or the money. A more flagrant breach of faith it would be difficult to imagine. It is not our special business here to characterize in all the terms that it deserves the conduct of the defendant in this transaction. We desire to see and to say nothing that is not apparent from the facts before us, particularly as the matter may come before us hereafter in another form, as well as before another Court of different jurisdiction; but it is impossible to show that the acts of the defendant did not specifically constitute secretion so as to support a *capias*, without its being seen at the same time what these acts really were; and we do feel called upon to say, under the circumstances, that these acts have a very grave appearance to the eye of the law, and are, besides, of a nature to give a fatal blow to the system of credit upon which it appears that the vast speculations in grain in this country depend. Our business is to decide whether, under the proof given in support of this petition, the *capias* can be maintained, and we are all of opinion, after a very careful consideration of the facts, that it cannot. It is very true that the affidavit charges the intent to have been to defraud the creditors generally and the plaintiff in particular. It is equally certain that there could be no intent to defraud the creditors generally,

The Molsons Bank vs. Mallins.

because what the defendant did had an opposite effect altogether. He took the plaintiff's money, and the creditors got the benefit of it as far as it went in a tottering and over-wrought business in which the defendant was soon overwhelmed. He no doubt defrauded the plaintiffs, and his intent to do so must be inferred from the fact; but the intent to defraud the plaintiffs is not enough, there must also be secretion. What constitutes secretion here? If the defendant, when he got the money from the Bank of Commerce on the second bill of lading, had gone to the Molsons Bank and paid his debt, there would have been an end of the matter; so that up to the time of getting the money there was no secretion. Then it must be that the non-payment of his debt alone constitutes the secretion alleged; but that is impossible. Secretion, or making away with the property, implies secrecy, something furtive and not openly done. Without laying down that there can be no such thing in any case as what has been spoken of as constructive secretion, we all think that the disposal of the wheat which was the property of the defendant, subject to the lien of the Bank, was not a secretion, as it was done with the plaintiffs' consent, and the subsequent use of the money, which was rather in the interest of the creditors than otherwise, though it may show the intent to defraud the plaintiffs, has not the character of secretion which must concur with the intent to defraud. We, therefore, confirm the order of the judge below quashing the *capias* and releasing the prisoner, and we feel regret at being obliged to award him his costs in review.

Judgment confirmed.

J. J. C. Abbott, Q.C., *E. Carter, Q.C.*, } for plaintiffs.
John A. Perkins, for defendant.
(F.D.M.)

COUR SUPERIEURE, 1880.

MONTREAL, 17 SEPTEMBRE 1880.

Coram TORRANCE, J.

No. 1082.

Guillaume vs. *La Cité de Montréal.*

JUGE:—1o. Que le défendeur qui veut faire cesser le privilége accordé au demandeur de le poursuivre *in formâ pauperis*, peut atteindre ce but en demandant la révocation de la permission ainsi accordée et en établissant que le demandeur était, lors de la poursuite, ou est devenu depuis, en état de subvenir aux déboursés.

2o. Que dans la présente cause, la défenderesse n'ayant point demandé cette révocation, mais au contraire l'annulation du bref de sommation et des procédés du demandeur et le renvoi *quoad ci présent* de son action, la motion par laquelle elle fait cette demande sera rejetée avec dépens.

Le 15 septembre courant, la défenderesse fit la motion suivante, à l'encontre de l'action du demandeur :

" Motion de la défenderesse, qu'attendu que le privilége accordé par cette Cour au demandeur en cette cause de procéder *in formâ pauperis*, a été accordé sous l'effet de fausses représentations, ainsi qu'il appert à la preuve faite en cette cause, et que le demandeur était lors de l'institution de la présente action et est

encore depuis en état de subvenir aux déboursés de la dite cause ; qu'attendu que le dit demandeur a violé et viole encore sciemment et volontairement l'acte concernant la perception, au moyen de timbres, des honoraires d'office et droits payables à la Couronne sur les procédures judiciaires, le bref émané en cette cause, ainsi que tous les procédés faits en cette cause, soient déclarés nuls pour toutes fins quelconques et en conséquence cassés (*quashed*), annulés à toutes fins que de droit et l'action déboutée quant à présent, avec dépens contre le dit demandeur, et les dépens des présentes, frais d'exhibits et autres frais incidents."

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D'Amour, de la part du demandeur, résista à cette motion, la prétendant aussi mal fondée en fait qu'en droit, et niant que le demandeur eût en quoique ce soit violé l'acte relatif aux timbres. Cet acte n'avait aucun rapport au cas actuel et n'aurait pu être invoqué par la défenderesse que si le demandeur n'eût pas obtenu la permission préalable de poursuivre *in formâ pauperis*. Mais dans la présente cause, le bref de sommation et tous les procédés du demandeur, loin d'être nuls faute de timbres, ainsi que le prétendait la défenderesse, avaient, au contraire, absolument la même validité que s'ils eussent été *littéralement couverts de timbres* : la permission de procéder *in formâ pauperis* tenant lieu de timbres jusqu'à révocation. Et au soutien de cette prétention, il cita l'article 32 du Code de Procédure Civile.

La Cour donna raison au demandeur et rejeta la motion de la défenderesse avec dépens.

Motion rejetée.(1)

Rouer Roy, C. R., faisant motion pour la défenderesse.
J. G. D'Amour, pour le demandeur.
(J.G.D.)

SUPERIOR COURT, 1876.

MONTREAL, 28TH JULY, 1876.

(IN CHAMBERS.)

Coram JOHNSON, J.

No. 2454.

Angers, Attorney General vs. The City of Montreal.

HELD :—That an Act authorising the City of Montreal to make a By-Law imposing a license tax on butchers keeping stalls or shops for the sale of meat, fish, &c., (in the City) elsewhere than on the public markets, is not *ultra vires* of the Provincial Legislature.

JOHNSON, J. This is a petition in the name of the Attorney General of the Province, under the 997th Article of the Code of Procedure, which reproduced the Statutes previously in force respecting proceedings against Corporations violating or exceeding their powers, and against persons usurping public offices; and the object is to set aside as illegal a by-law of this city, being No. 90, concern-

(1) Un jugement dans le même sens fut rendu le 3 mai 1880, Rainville, J., dans la cause de Mailloux vs. Trudeau, C. S. No. 961. (J.G.D.)

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ing private butchers' stalls. I may say at the outset that I had some doubts whether the principal point raised here could come up properly in this manner. The 12 Vict., c. 41, reproduced in the Code, was passed before our present political system was in existence, and it related to the redress to be had against Corporations or individuals, for misconduct in respect to excess of power in the former, and intrusion into office by the latter. The excess of power complained of here seems to be not that the Corporation exceeded the powers professedly given therein, but that they have exercised powers wrongly given: in other words, that the Local Legislature had no right to give the powers that have been used; and this proceeding is therefore an attack on the Statute, and not on the by-law: and most assuredly the 12th Vict. had no such object, nor does the Code go any further than the Statute, nor did it come into force after Confederation. But, though I have no doubt that such a thing was never contemplated by the Statute or by the Code, yet I am clear also that the words both of the Statute and of the Code embrace the present case, for the remedy is given *inter alia*, "whenever any Corporation exercises any power, franchise or privilege that does not belong to it; and the effect of these words, whether contemplated or not, is to subject the by-law to examination with reference to everything that affects the power of the Corporation to pass it. Therefore I come at once to consider the principal ground of this application, which is that the British North America Act of 1867 confers the exclusive power to regulate trade and commerce upon the Federal Parliament, and that this by-law, being professedly passed under the authority of Provincial legislation, is a violation and an excess of power. It is very true that section 91 of the Imperial Act of 1867 does define the powers of the Federal Parliament, and in these words: "It shall be lawful, etc., to make laws for the peace, "order and good government of CANADA, in relation to all matters *not* "*coming* within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces;" therefore, before this subject can be said to be within the jurisdiction of the Federal Parliament it must be shown: First, that power to make laws for Canada (that is for the Dominion) is power to make laws for the local purposes of the Provinces: and, secondly, that it is a power not assigned exclusively to the Legislatures of the Provinces. Neither of these propositions is true. The trade and commerce of the Dominion is a very distinct thing from the individual trades or callings of persons subject to the municipal government of cities; and the exclusive powers of the Provincial Legislatures are specifically extended by section 92, "to make laws in relation to municipal "institutions, and also in relation to shop, saloon, tavern, auctioneer, and other "licenses, in order to the raising of a revenue for provincial, local, or muni"cipal purposes." Therefore the Corporation, by this by-law, have neither interfered with the trade of the Dominion, nor exercised power which it was not within the exclusive right of the Provincial Legislature to give them. The by-law is based upon section 123 of the City Charter (37 Vict., c. 51) paragraphs 2, 27, 31, and 32.

The 2nd paragraph of this section gives the general power to make by-laws for the health, internal economy, and local government of the city. Paragraph 27 gives power to make by-laws "to establish and regulate public

"markets, and private butchers' or hucksters' stalls; and to regulate, license or "restrain the sale of fresh meats, vegetables, fish, or other articles usually sold "on markets." Paragraph 31 authorizes by-laws for the purpose of regulating where and how live stock and provisions may be exposed for sale on the public markets, and specially provides that "the said Council may, if they deem "it advantageous, by a by-law to be passed for that purpose, empower any person to sell, offer, or expose for sale, in any place beyond the limits of the "said markets, meat, vegetables and provisions usually bought and sold on public markets, upon such person obtaining a license for that purpose from the said "Council, for which he shall pay to the City Treasurer such sum as may be "fixed by such by-law, and by conforming with the rules and regulations contained in the said by-law."

Section 81 of the Charter, using the power given by the 92nd section of the B. N. America Act, 1867, makes no distinction between the form of a tax, and that of a license; it says: "the said Council may also, if they "see fit, impose the said tax in the form of a license, payable annually at such "times, and under such conditions and restrictions as the said Council may "determine."

The power, then, appears to have been constitutionally given by the Provincial Parliament, and properly used by the Corporation. As to the argument that this was virtually a prohibition of trade, it need only be observed that it is merely a prohibition of unlicensed trade, the power to license being clearly given. The amount appears by the evidence to be much less than one-half of what was formerly imposed: nor could I properly consider the amount where there is no specific limit in the law. Dillon, on Municipal "Corporations, p. 198, No. 79, says, where there is a clear intent that licenses "are imposed as a source of revenue to the city, the Court will not mind the "amount."

Then it was mentioned in argument that an opinion of Mr. Hillyard Cameron's was in point. I have no objection to consult anything reasonable written by anybody, and that can throw light on this subject, and, considering the high professional rank of Mr. Cameron, I should say his opinions ought always to have great weight; but it is clear that his opinion, as far as this case is concerned, would be dead against the petitioners. Mr. Cameron was never consulted as to the right of Provincial Legislatures to regulate the exercise by Municipal Corporations of the powers legally conferred on them. He was asked his opinion as to the right of the Ontario Parliament to abolish a certain traffic, and he distinctly says: "I have no doubt that the Provin- "cial Legislatures have the power to require that a license shall be necessary, etc., "and to determine the fee or duty that shall be payable therefor, and to make "regulations respecting the issuing of licenses, etc;" but it is as to the power of the Legislature to prohibit the trade after the regulations should have been complied with that he is asked his opinion. These municipal powers, and their exercise, are to be liberally interpreted. See Dillon, p. 440, No. 353, 350, and 251, and in note, the dictum of Chief Justice Eustis; also Harrison, p. 167, note; Angell, 372; 1 Willcock, No. 383; and Grant on Corporations, p. 88.

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This is the whole of the case, as far as it presents any legal question. The allegation of a partial use of their power by the Corporation, and of the corruption of one of its members, is not only not sustained by a particle of evidence, but, as far as any attempt at proof has been made, it is disproved.

I have gone into this matter further than I was bound to do, under the decisions that have already been given on the principal point, because, although it is our nominal vacation, and although I am very ill, the public good, and the assertion of what they deem to be their rights by a respectable class of men, seems to require it; but I might perhaps have contented myself by referring to the last case—that of Bourdon, decided on the 15th of May last by Mr. Justice Monk, with the well-understood concurrence of the Chief Justice and Mr Justice Sanborn—where the subject of this application was treated at length and with great attention, and power; and more particularly perhaps I might have satisfied myself by referring to that case, as the ruling of a single Judge at this particular time can hardly be sought, without an intention of going further. However as the applicant's counsel argued the case with great earnestness, I have gone into it again for the satisfaction of the parties: and my judgment is that the petition be dismissed with costs, for the reasons I have given.

The judgment is as follows:—

"Having seen and examined the petition *requête libellée*, presented and filed by the petitioner on the 10th of June last, praying, for the causes and reasons therein stated, that the by-law No. 90, concerning private butchers' stalls, made and passed by the Council of the said defendant, on the 22nd day of December, 1875, be declared to be *ultra vires* of the City of Montreal and its Council, and be declared null and void and of no effect, and be quashed and set aside, and having seen and examined the answer of the defendant to the said petition, and heard the parties, &c.;

"Considering that the by-law No. 90 aforesaid is not *ultra vires* of the said Council; but on the contrary is within the powers conferred on the defendant by the statute 37 Vict. c. 51;

"Considering also that the said last mentioned statute is a statute of the Parliament of this Province passed and made in virtue of the powers expressly given to the said Parliament by the B. N. A. Act, 1867, and more particularly by the sections 91 and 92 of the said B. N. A. Act, 1867;

"Considering that the allegations of the said petition are not made out or established either in law or in fact, I, the undersigned judge, do dismiss the said petition with costs."

W. H. Kerr, Q.C., for petitioner.
R. Roy, Q.C., for the City of Montreal.
(*J. K.*)

Petition rejected.

SUPERIOR COURT, 1879.

MONTREAL, 7TH NOVEMBER, 1879.

Coram MACKAY, J.

No. 2583.

Mallette et al. vs. *The City of Montreal.*

HELD :—That an Act authorising the City of Montreal to make a by-law imposing a license tax on butchers keeping stalls or shops (in the city) for the sale of meat, fish, &c., elsewhere than on the public markets is not *ultra vires* of the Provincial Legislature.

MACKAY, J. :—This case was argued before me as an injunction case, but has been put before me not on an injunction, except very incidentally, but on the merits of an action by a number of individual butchers joining together as plaintiffs irregularly to sue the City to have a by-law of the 22d December, 1875, of the city, in so far as imposing on the plaintiffs a license tax of $200 each, declared null, and the City forbidden from collecting the tax. All the plaintiffs are butchers, selling away from public market. Misjoinder is not pleaded by the City, so I will not say anything on that subject. The defendants plead a general denial, and no more. I see no answer to the injunction. The questions to be decided by the Court are therefore not difficult. Have the plaintiffs proved their allegations, and are their law propositions stated in their declaration sound? Are the by-laws (for there really are two) complained of null upon the principles enunciated by the plaintiffs? They say that the City has imposed upon them a business tax and a license tax, and that these ought to be declared null as violating the principle of equality, and also the rule that no persons or things can be taxed twice for the same object. The declaration sets forth certain provisions of the City Charter, 37 Viet., c. 51, sec. 123, upon which the by-laws attacked are founded, and claims that by common law no Legislature or corporation has right to establish inequality of taxation, whether by name of tax, license, or duty between persons of the same class or occupation. The plaintiffs complain of the by-law prohibiting persons selling meat, fish, etc., at other places than on the public markets, if within 500 hundred yards of a market, unless the persons so selling have a license. This is the one of December, 1875. At the argument it was urged that the by-law is an excess of power, being a regulation of trade and commerce, trade and commerce being, by the B. N. A. Act of 1867, exclusively to be regulated by the Dominion Parliament.

The by-law reposes on an Act of the Quebec Parliament passed since Confederation, and this Act, it is claimed, was and is *ultra vires* of the Quebec Legislature, in so far as pretending to confer right on the city to regulate trade and commerce. The by-law referred to has several times been attacked, particularly in the case of *Angers, Atty. Gen. v. The City*, judged in 1876 by Mr. Justice Johnson, when the Attorney General's petition was dismissed, the by-law being declared not *ultra vires* of the city, and the Act 37 Viet. being also declared not *ultra vires* of the Quebec Legislature. "The trade and commerce of the Dominion," said Mr. Justice Johnson in that case, "is a very distinct thing from the individual

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trades or callings of persons subject to municipal government in cities;" and he went on to observe that the Provincial Legislatures had right to make laws in relation to municipal institutions, and also in relation to shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes, and he found the licenses required of butchers to be imposed to raise revenue for the city, not unlawfully. In September, 1879, Mr. Justice Jetté, in a case in which one *Levesque*, a butcher, complained of having been convicted under the by-law in question, held the conviction right, and the by-law lawful.* I look upon the by-law, as partly a regulation of police, and partly a by-law to make revenue, for City purposes, by the way or in form of licenses. I consider it formal and well founded. I see no reason for declaring it null. I can see no reason for allowing butchers to establish stalls wherever they like in the city without regulation. A butcher's shop may very easily be made a nuisance to adjoining, or even neighboring, habitations. The tendency of butchers' shops is by many considered to be to hurt adjoining habitations. M. N. has his patrimonial residence on Dorchester street west. A butcher sets up a stall next door. May not M. N. feel hurt? May he not consider his enjoyment of his residence diminished? But suppose two butchers to set up, one on each side of M. N.!

I consider the by-law complained of reasonable, nor do I see it work inequality of taxation in a bad sense. As to favors to some butchers over others, I see that all can enjoy equally the advantages of the public markets. Action dismissed with costs.

Doutre, Branchaud & McCord, for plaintiffs.

R. Roy, Q. C., for defendants.

(J.K.)

SUPERIOR COURT, 1879.

MONTREAL, 25th NOVEMBER, 1879.

Coram PAPINEAU, J.

No. 2583.

Mallette et al. vs. *The City of Montreal.*

HELD:—1. The Superior Court has a discretionary power, under 41 Vict. [Queb.] cap. 14, to issue an injunction to the City of Montreal, ordering the city to suspend proceedings before the Recorder's Court, for the enforcement of an alleged illegal by-law; and this even when the question of the validity of such by-law is pending before the Court of Appeal.

2. The Court will not exercise such power unless the party petitioning for the injunction is without other remedy and is exposed to irreparable injury, especially if the issue of the injunction will cause serious injury to the party enjoined.

3. The condemnation to a fine, with a term of imprisonment in default of payment, does not constitute a case of irreparable injury.

PAPINEAU, J.—Les demandeurs, au nombre de 71, tous bouchers, tenant des marchés privés dans la ville de Montréal, présentent à la Cour une requête pour obtenir un bref d'injonction sous des circonstances qui peuvent se réduire en dernière analyse à ce qui suit.

*23 L. C. Jurist, 284.

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La Corporation de la ville, par son conseil, a passé des règlements, obligeant les personnes qui voudraient vendre, ailleurs que dans les marchés publics, de la viande de boucherie et les autres choses que l'on vend ordinairement dans ceux-ci, auraient à prendre, de la Corporation, une license à cet effet, et à payer pour cette licence, une somme de deux cents piastres. Plusieurs des requérants ont été condamnés, les uns une fois, les autres plusieurs fois, par le Recorder, à payer une amende de $40, et, à défaut de paiement, à deux mois de prison, pour avoir vendu ailleurs que dans les marchés publics, sans avoir obtenu la licence exigée.

D'autres, en grand nombre, ont été poursuivis pour la même offense.

Quelques-uns des jugements ont été exécutés; les autres sont sur le point de l'être.

Les requérants ont pris deux actions pour faire déclarer ces règlements de la Corporation, nuls, comme excédant les pouvoirs de la Corporation, en ce qu'ils permettent à cette dernière de taxer inégalement les diverses personnes exerçant, dans la ville, une même industrie, et créant par là en faveur des uns, aux dépens des autres, des avantages illégitimes, ou des préférences injustes.

Une des actions est encore pendante, l'autre a été jugée défavorablement à ceux des requérants qui l'avaient intentée, et elle a été portée en appel devant la Cour du Banc de la Reine qui est dûment saisie de l'appel, au moins apparemment.

Tant que cette cause a été pendante devant la Cour Supérieure, les demandeurs en icelle avaient réussi à faire suspendre l'exécution des jugements du Recorder au moyen d'injonctions interlocutoires temporaires prolongées au besoin par la Cour saisie du litige; mais ces injonctions n'ont plus d'effet, et les requérants représentent qu'il est urgent pour eux, et surtout pour ceux d'entr'eux qui ont été condamnés plusieurs fois, d'obtenir un ordre de cette Cour enjoignant à la Corporation de suspendre l'exécution des warrants d'emprisonnement émis ou à être émis contre aucun des Requérants jusqu'à ce qu'un jugement ait été prononcé par la Cour du Banc de la Reine siégeant en appel dans la cause où Mallette et autres sont appelants et la cité de Montréal intimée, sous telles conditions qu'il plaira à la Cour de fixer.

Avis de cette demande a été donné à la partie adverse et l'avocat de la cité a pu faire valoir ses objections à la requête qui n'a pas été présentée *ex parte*.

Deux questions principales se sont présentées. 1. Est-ce la Cour du Banc de la Reine, devant laquelle se trouve le litige en question, qui a le pouvoir de faire émaner le bref d'injonction, ou bien ce pouvoir peut-il encore être exercé par la Cour Supérieure qui n'est plus saisie du litige.

Nous n'avons pas à décider la première de ces questions. Deux honorables juges de la Cour du Banc de la Reine, à qui semblable demande a été soumise, l'ont décidée, mais ont trouvé préférable, nous dit-on, de ne pas exercer leur pouvoir et de laisser à la Cour Supérieure l'initiative en pareil cas. La présente requête n'est pas faite à cette Cour, en tant que saisie du litige porté devant la Cour du Banc de la Reine, l'avocat des requérants ne nous demande pas d'exercer une juridiction que nous avons cessé d'avoir sur ce litige.

La requête n'est pas faite non plus comme incident de la cause que l'on nous dit être encore pendante devant la Cour Supérieure et nous n'avons pas à la traiter comme demande d'un ordre provisoire dans une cause mue devant nous.

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C'est une demande nouvelle, indépendante des autres, faite en dehors de celles-ci, pour détourner de la personne des requérants un péril imminent, et un tort qu'ils considèrent irréparable, jusqu'à ce qu'ils aient eu le temps de faire disparaître la cause du mal qu'ils redoutent, en obtenant, de la Cour du Banc de la Reine, ce que la Cour Supérieure a cru devoir leur refuser. Si les prétentions des requérants sont bien fondées, c'est-à dire si la cité de Montréal n'a pas le pouvoir, par sa charte, de faire des règlements imposant aux bouchers, tenant des étaux en dehors des marchés publics, l'obligation de payer une licence sans l'imposer également à ceux qui en tiennent dans les marchés publics, nous avons incontestablement, en vertu de la 41eme Vict., chap. 14, de Québec, le pouvoir d'accorder un bref d'injonction pour empêcher la cité de Montréal soit de continuer une poursuite commencée devant la Cour du Recorder en vertu de tels règlements, soit pour arrêter l'exécution d'un jugement rendu dans une telle poursuite, ou même pour empêcher le paiement, à la cité, de l'argent qui aurait été prélevé en vertu d'un tel jugement.

En accordant une injonction de ce genre, cette Cour n'exercerait aucun pouvoir sur la Cour du Recorder, et n'interposerait aucunement son autorité pour empêcher la Cour du Recorder d'agir dans les limites de ses pouvoirs. Non, l'injonction ne s'adresserait aucunement au tribunal du Recorder, mais à la cité de Montréal même, à qui elle défendrait de requérir le Recorder d'exercer l'autorité que la loi confère à ce dernier. (Kerr on Injunctions, édition de 1867, pp. 14, 15, et 21).

Nous ne mettrions nullement en question la juridiction de la Cour du Recorder comme cela peut se faire par voie de Certiorari.

Cette Cour ne s'immiscerait, non plus, dans la cause présentement devant la Cour d'Appel, mais elle enjoindrait à la cité de suspendre tous ses procédés dans la Cour du Recorder jusqu'à la décision du litige porté en appel, laquelle décision devra déterminer virtuellement la valeur des jugements du Recorder, en déclarant nuls ou effectifs les règlements sur lesquels ses jugements sont basés.

Il nous reste à décider si les requérants sont dans une position telle qu'on doive exercer en leur faveur le pouvoir extraordinaire et discrétionnaire donné à la Cour par la loi, d'arrêter au moyen d'une injonction l'exécution de plusieurs jugements.

Ce remède n'est accordé que dans les cas où il n'y en a pas d'autres en vertu de la loi, et où le tort appréhendé serait irréparable. Celui qui le demande doit faire voir en sa faveur un droit clair et certain, ou au moins une forte présomption de la rectitude des prétentions qu'il veut protéger au moyen de l'injonction. La cour doit veiller aussi, à ce que la partie adverse n'éprouve pas, de son côté, un dommage considérable (Hilliard on Injunctions, pp. 14, 15, 19 et 25, édition de 1869, §§ 16, 18, et 22 et 32).

Quant aux droits des requérants, ils ont contre eux la lettre de la loi, 37 Vict. ch. 51, sect. 31 et 32, et l'interprétation donnée à cette loi par les jugements des juges qui se sont prononcés sur la légalité des règlements de la cité de Montréal sur cette matière. Cependant, ils ont en leur faveur le principe de justice que les impôts doivent être répartis équitablement et autant que possible également sur tous les contribuables se trouvant dans les mêmes conditions. Ils ont procédé avec diligence dans leur action jusqu'au jugement qui est main-

tenant devant la Cour d'Appel. Nonobstant cet appel on procède à faire exécuter des warrants d'emprisonnement contre ceux d'entr'eux qui ont été condamnés par le Recorder, et ils prétendent que l'emprisonnement pour eux est un tort irréparable.

De l'autre côté, la cité de Montréal peut souffrir aussi du défaut et du retard de paiement des licences, que doivent, d'après ses règlements, les bouchers ayant des étaux privés, licences qu'ils ne paient pas puisqu'on les a condamnés à des pénalités pour ne pas s'être conformés aux règlements exigeant ces licences.

Les requérants sont au nombre de 71 ; la somme des licences payables par eux tous, est de $14,200. C'est un item assez considérable que la Corporation ne perçoit pas. C'est encore un préjudice assez grand que celui de l'inexécution des règlements, pendant une longue période de temps, si ces règlements sont réellement pour l'avantage public et fondés sur la loi, et on doit supposer qu'ils le sont.

Le dommage ou le tort à souffrir par les requérants n'est pas irréparable, au moins quant à ceux qui sont assez fortunés pour être capables de payer l'amende ; il n'est même pas absolument irréparable, dans un sens, pour ceux qui seraient incarcérés à défaut de paiement de l'amende. En effet, au point de vue du déshonneur qu'il y a d'être incarcéré pour désobéissance ou contravention aux lois, il n'y a guère de réparation adéquate possible. Cependant les cours de justice sont souvent appelées à prononcer des condamnations au paiement de sommes d'argent comme réparation d'un emprisonnement illégal, et dans ce sens, le mal redouté par les requérants ne se trouve pas tout-à-fait irréparable, parce que la cité de Montréal est solvable.

Nous ne trouvons pas, pour toutes ces raisons, le droit des requérants assez clair et assez certain, ni leur mal assez irréparable pour accorder l'injonction, surtout en face du préjudice que la cité aurait à souffrir.

La requête est renvoyée avec dépens contre les requérants.

Petition rejected.

Doutre, Q. C., for the petitioners.
Roy, Q. C., for the city of Montreal.
(J.K.)

COUR DU BANC DE LA REINE, EN APPEL, 1879.

MONTREAL, 22 DECEMBRE 1879.

Coram MONK, J., RAMSAY, J., TESSIER, J., CROSS, J., ROUTHIER, J. *ad hoc.*

No. 141.

EPHREM HUDON ET AL.,

(*Demandeurs en Cour Inférieure.*)

APPELANTS;

ET

CHARLES F. PAINCHAUD ET AL.,

(*Défendeurs ès-qualités en première instance.*)

ET

SEVERE RIVARD,

(*Tiers-saisi en première instance,*)

INTIMÉ.

JUGE:—1o. Qu'une partie défenderesse condamnée comme usufruitière universelle de son mari décédé est dans la même condition qu'un légataire universel, et est personnellement obligée au paiement de la condamnation.

2o. Qu'un tiers-saisi appelé à déclarer ce qu'il doit à une partie ainsi désignée dans le bref, est tenu de déclarer ce qu'il lui doit tant personnellement qu'en sa qualité de légataire ou usufruitière universelle.

3o. Que le juge, lors de l'audition finale, est tenu de réviser une décision maintenant une objection faite par un tiers-saisi de déclarer ce qu'il doit personnellement à un légataire universel ou à un usufruitier universel, ce n'est pas chose jugée.

4o. Que la donation universelle en usufruit par contrat de mariage est une donation *causa mortis*.

Le 30 mai 1876, par jugement de la Cour de première instance confirmé sur l'appel, les défendeurs Charles F. Painchaud et Eucher B. Dufort, en leur qualité de légataires fidéi-commissaires de feu David Laurent et Dame Anathalie Trudelle, sa veuve, en qualité d'usufruitière universelle de son mari, ont été condamnés au profit des appelants au paiement de la somme de $5,159.48 avec intérêts et dépens.

La défenderesse avait été assignée comme donataire universelle en usufruit des biens de son époux décédé. Elle avait été également instituée légataire universelle en usufruit, mais elle avait renoncé à ce legs pour s'en tenir à la donation à elle faite par son contrat de mariage.

Sur ce jugement, le 17 mars 1879, une saisie-arrêt a été pratiquée entre les mains de l'intimé Sévère Rivard. Ce dernier a déclaré qu'il n'avait entre ses mains qu'une salamandre de la valeur d'environ $80 appartenant à la dite dame Anathalie Trudelle, (madame Laurent) comme usufruitière et rien de plus.

A la requête des demandeurs le 17 mai 1879, la Cour ordonna au tiers-saisi de répondre aux questions qui lui seraient posées, conformément à l'article 1699 du Code de Procédure.

Par ses réponses il admet que la société Laurent et Laforce, dont il était membre, devait à madame Laurent, lors du décès de son mari, une somme de six mille dollars, et qu'il avait des meubles en sa possession appartenant à madame Laurent personnellement, et il continue son interrogatoire comme suit:

Q. N'êtes-vous pas endetté envers madame Laurent, la défenderesse en cette cause, en son nom personnel ou autrement?

Objecté à cette question comme illégale quant à la partie qui tend à établir aucune obligation de la part du tiers-saisi envers la défenderesse en son nom personnel, attendu que telle question ne peut être faite sur cette procédure actuelle.

Objection maintenue.

Les demandeurs excipent respectueusement au jugement interlocutoire rendu sur l'objection qui précède et se réservent le droit de le faire reviser.

Q. Lorsque vous avez fait votre déclaration comme tiers-saisi, et que vous avez déclaré n'avoir en votre possession qu'un *safe*, entendiez-vous, et avez-vous voulu, par là, déclarer que c'était tout ce que vous aviez en votre possession, et tout ce que vous deviez à la défenderesse Anathalie Trudelle, tant comme légataire en usufruit ou personnellement à elle?

Objecté à cette question pour les mêmes raisons que pour l'objection à la question précédente.

Renvoyée.

Le tiers-saisi excipe respectueusement à ce jugement se réservant le droit de le faire reviser.

R. Dans cette déclaration, je n'entendais déclarer que ce qui était dû à madame Laurent *ès-qualité d'usufruitière*; en ma qualité d'avocat et connaissant la cause, j'ai répondu de cette manière.

Q. Lui devez-vous alors personnellement, et quelle somme?

Objecté à cette question parce qu'elle ne tend à établir aucune obligation de la part du tiers-saisi envers les défendeurs *ès-qualité*, et qu'elle ne peut être faite sur telle procédure.

Objection renvoyée.

Le tiers-saisi excipe respectueusement à ce jugement, se réservant le droit de le faire réviser.

R. Je ne suis pas prêt à répondre à cette question, parceque je dois quelqu'argent à madame Laurent, et qu'elle me doit de son côté, nos comptes n'ont jamais été réglés.

Le 7 juin de la même année (1870) les appelants ont contesté cette déclaration et leurs moyens sont les suivants:

1o. Lors de la saisie-arrêt le tiers-saisi intimé avait en sa possession des meubles autres que celui déclaré, et était endetté envers la défenderesse dame Anathalie Trudelle en des sommes considérables.

2o. Les exécuteurs testamentaires de son mari, feu David Laurent, lui avait remis en sa qualité d'usufruitière universelle, tous les biens et effets de la succession.

Le tiers-saisi avait agi comme procureur de dame Anathalie Trudelle et avait en sa possession des sommes d'argent appartenant à la succession s'élevant à plus de $6,000.

4o. La défenderesse madame Laurent a été condamnée comme légataire en usufruit de son mari, David Laurent, elle a accepté cet usufruit et elle est, par là, devenue débitrice personnelle du jugement.

5o. La défenderesse a vendu à M. Laforce, l'associé de l'intimé, les droits

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la succession Laurent pour $6,000.00, et l'intimé est obligé de payer cette somme, vû qu'il fait partie de la société existant entre Laforce et lui.

Le 7 juin 1879 les demandeurs produisirent des moyens de contestation additionnels, alléguant : que madame Trudelle ayant été condamnée par le jugement comme usufruitière universelle sans avoir renoncé à ce legs, sans alléguer qu'elle avait absorbé la valeur de son legs et sans rendre compte de la succession à elle transmise, elle se trouvait personnellement responsable, vis-à-vis des demandeurs ;

Qu'il appert par la déclaration du tiers-saisi que comme associé d'Auguste Laforce il est endetté envers la défenderesse pour plus de $3,000 ;

Qu'il appert en outre qu'elle a vendu tous les droits de la succession dans la dite société à Auguste Laforce, et s'est par le fait irrévocablement lié au paiement des dettes de la succession.

En réponse à la contestation le tiers-saisi énonce :

Que la possession des biens de la succession par la défenderesse comme donataire universelle, et sa condamnation *ès-qualité* sans avoir rendu compte et sans réclamation de sa part, qu'elle avait absorbé tous les biens en liquidation des créances, n'établissait pas que le tiers-saisi avait fait une fausse déclaration ou qu'elle fut personnellement obligée au paiement du jugement ;

Que le tiers-saisi était assigné pour déclarer ce qu'il devait à la défenderesse *ès qualité*, et non personnellement, et sa responsabilité personnelle était matière à discussion entre elle et les demandeurs.

En supposant la défenderesse personnellement responsable, elle ne pouvait l'être sur ses propres biens, si ce n'est jusqu'à concurrence du bénéfice qu'elle a obtenu de l'usufruit à elle transmis, ayant fait [illegible]aire des biens de la succession, et elle a droit d'offrir un compte avec [illegible]noncer à son usufruit et d'exercer sur ces biens les réclamations qu'elle [illegible]r de son chef concurremment avec les demandeurs, ce qu'elle ne peut faire [illegible] présente contestation.

Que les demandeurs sont tenus de discuter au préalable les biens de la succession.

A l'audition de la cause le juge en première instance renvoya la contestation, déclarant qu'un juge de la même cour ayant déclaré que le tiers-saisi n'était pas tenu de déclarer ce qu'il devait personnellement à la défenderesse condamnée comme donataire universelle en usufruit, c'était chose jugée, et que la Cour d'Appel seule pouvait modifier tel jugement.

En appel,

Hon. R. Laflamme, C. R., Conseil des appelants, maintint que le juge en première instance était tenu de réviser l'interlocutoire prononcé sur les questions faites au tiers-saisi, lui demandant de déclarer ce qu'il devait à la défenderesse personnellement aussi bien qu'en sa qualité d'usufruitière universelle.

2o. Le tiers-saisi était tenu de faire cette déclaration et ayant délibérément refusé de la faire il devait être condamné personnellement au paiement de la dette.

3o. Le jugement condamnant la défenderesse *ès-qualité* de donataire universelle en usufruit sans qu'elle eut excipé d'aucun privilège ou droit de restreindre la condamnation, ou d'en suspendre ou changer l'effet, elle était irrévocablement

tenue et obligée au paiement de cette dette comme si elle eut été héritière pure et simple.

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La prétention des appelants est que la donation universelle en usufruit par contrat de mariage, est une donation à cause de mort, et considérée en loi comme équivalente à une donation testamentaire. Une semblable donation ne peut être faite que par testament ou par contrat de mariage. C. C. Art. 818, 819, 823, 824.

Les appelants insistèrent sur la différence des règles de notre droit [illegible] du Code Napoléon.

L'art. 878 de notre Code établit que "les légataires universels ou [illegible] "universel ne peuvent après acceptation se décharger personnellement des [illegible] "et legs qui leur sont imposés par la loi ou par le testament sans avoir le bé[illegible] "d'inventaire, ils sont à cet égard et en tout ce qui concerne leur gestion, leur "reddition de compte et leur décharge sujets aux mêmes règles que l'héritier.

Cette disposition est de droit nouveau. Sous l'ancien droit le légataire universel n'était pas tenu *ultra vires*; il pouvait toujours se libérer en faisant inventaire et rendant compte. (Guyot Rep. vo. Bénéfice d'Inventaire, p. 296. Id. vo Légataire, p. 94, 2 Bourjon 324.)

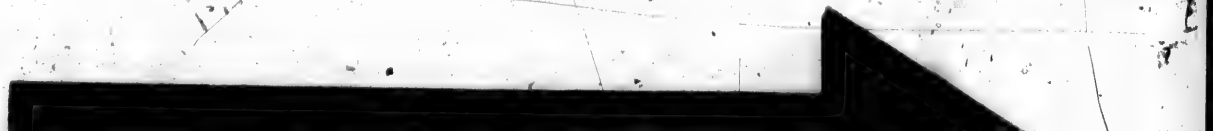
Le Code Napoléon ne contient rien d'analogue, au contraire, l'article 871 veut que le légataire à titre universel ne contribue aux dettes avec les héritiers qu'au *prorata* de son émolument, et en outre, le Code Français considère le légataire en usufruit comme légataire particulier, 4 Proudhon, Usuf., p. 79, No. 1892.

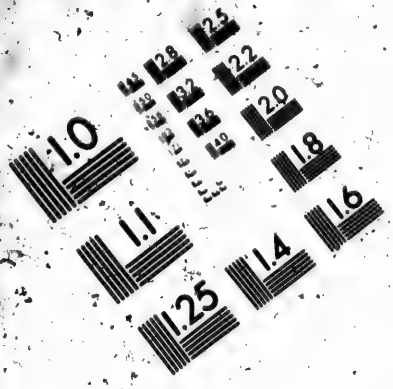
Notre Code, art. 876, au contraire constitue le légataire de l'usufruit à titre universel, légataire universel.

L. O. Loranger, C. R., pour l'intimé, prétendit que la condamnation contre la défenderesse comme usufruitière ne pouvait de droit entrainer une responsabilité équivalente à une condamnation personnelle; que notre Code avait adopté les principes du Code Napoléon et que le legs en usufruit, même universel, était un legs particulier, (Demolombe, Distinction des biens. No. 258, 521; 2 Marcadé, No. 524.) Le jugement n'a pas condamné la défenderesse comme débitrice personnelle des appelants. Les légataires fidei-commissaires représentaient seuls la succession du défunt, et la défenderesse comme simple détentrice des biens à titre précaire, et les premiers seuls étaient tenus à l'universalité des dettes. Si la succession était solvable, la défenderesse ne pouvait être tenue au paiement d'un seul dénier; si elle était insolvable elle n'aurait été tenue de contribuer qu'en proportion de son émolument. Le jugement n'a pas déterminé l'étendue de cette condamnation en fixant la contribution respective. De plus le légataire particulier se décharge de toute obligation envers les créanciers en abandonnant l'objet du legs.

Madame Laurent exempte de toute contribution aux dettes pouvait cependant en devenir responsable, mais quand et comment? En cas d'insolvabilité de la succession et d'insuffisance des biens, et jusqu'à concurrence de son émolument.

Pour exercer un recours sur ses biens et exécuter le jugement contre elle, c'est-à-dire avant de la traiter comme débitrice personnelle, il fallait donc au préalable établir l'insuffisance des biens de la succession et faire fixer le mon-

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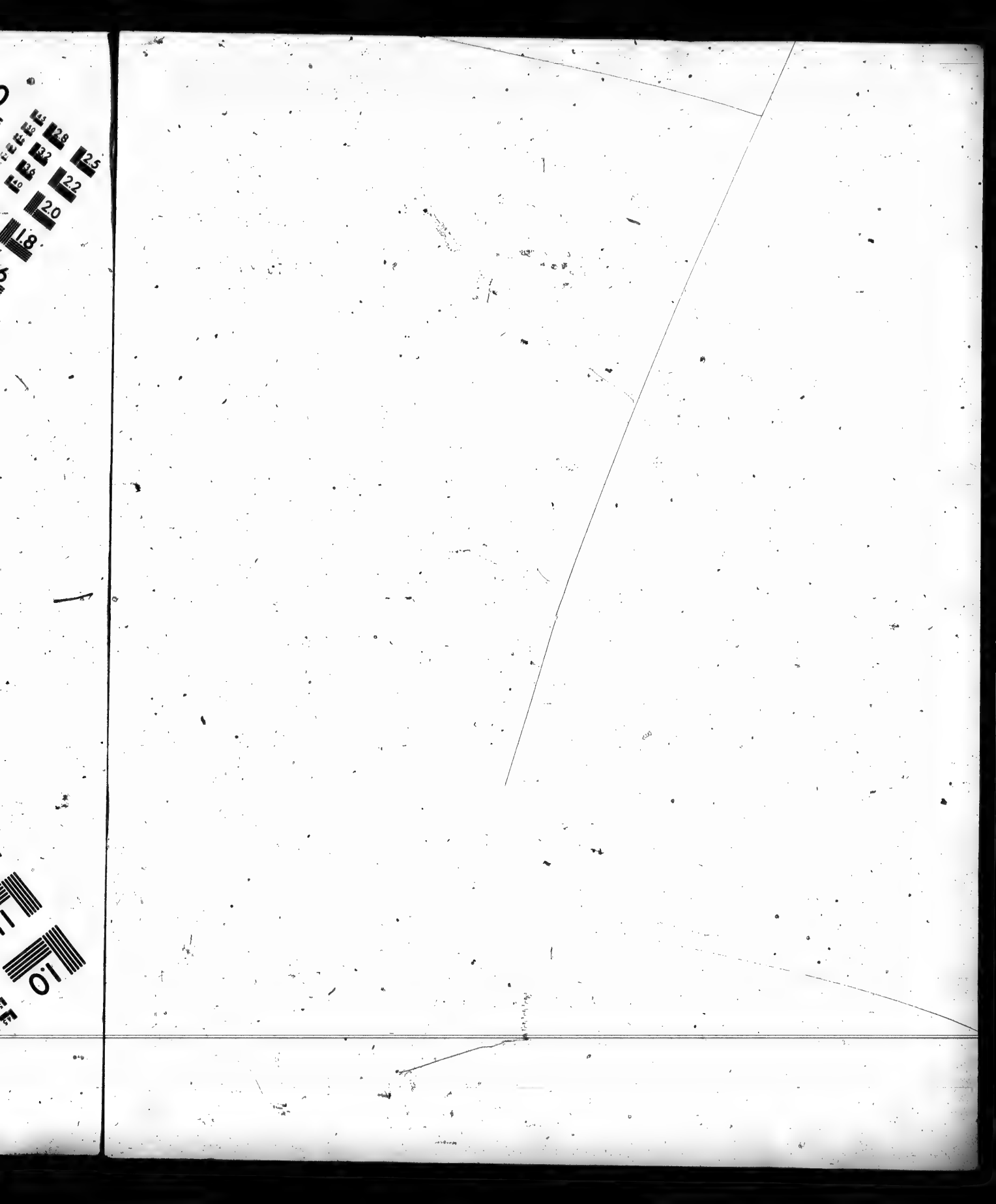

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tant de la contribution. Le jugement rendu contre elle n'était donc qu'un jugement préparatoire consacrant en principe, et pour éviter une nouvelle demande, un circuit d'actions, sa responsabilité éventuelle, mais n'ayant par lui-même aucune force d'exécution, avant la détermination de l'étendue de cette responsabilité.

On veut *de plano*, sans avoir fixé l'étendue de sa responsabilité pécuniaire, exécuter le jugement contre la défenderesse, indéfiniment et sur ses biens propres, soit que ses intérêts dans l'usufruit des biens aient égalé la dette, ou qu'ils lui soient restés inférieurs, c'est-à-dire sans égard au chiffre de son émolument. Mais il peut y avoir là criante injustice, palpable iniquité? Au point de vue de la logique judiciaire il y a plus, il y a absurdité!

Mais le jugement n'a rien prononcé de semblable; il a simplement énoncé la nature de la responsabilité de la défenderesse, et il a laissé aux parties le soin de faire liquider le montant de la condamnation.

Il eut donc fallu qu'au préalable un autre jugement sur action en reddition de compte ou toute autre action équivalente, eût été rendu, sur constatation de l'émolument de la défenderesse, et qu'il l'eût condamnée personnellement au reliquat, pour qu'un exécutoire sur ses biens personnels pût être décerné contre elle.

L'intimé est sans intérêt à nier que sur le jugement tel que rendu, les appelants pussent pratiquer une saisie contre les biens de la succession usufruitée par la défenderesse, et pussent arrêter entre les mains des débiteurs de la succession ses créances actives. C'est aussi ce qu'ont fait les appelants. Jusque-là ils étaient dans leur droit, mais où ils ont cessé de l'être et où leur tort a commencé, c'est quand, après avoir fait arrêter ces créances entre les mains de l'intimé, le sommant de déclarer ce qu'il devait à l'*usufruitière*, c'est-à-dire à la succession dont elle était en possession, les créances comme les autres biens, ils ont contesté la déclaration comme inexacte, en ce qu'ils ont prétendu que les créances personnelles de la défenderesse était saisies entre ses mains en vertu de la saisie-arrêt décernée contre la défenderesse assignée comme usufruitière (et en vertu du jugement elle ne pouvait l'être autrement), et qu'il devait en faire déclaration pour se voir condamner à les verser entre les mains des saisissants.

La Cour d'Appel, ROUTHIER, J. *ad hoc*, prononçant le jugement, dit:

I. La première question discutée par les parties en cette cause est de savoir quelle est la portée légale du jugement rendu contre les défendeurs, et notamment quelle est la responsabilité de dame Anathalie Trudelle, veuve de feu David Laurent, qui a été condamnée avec les deux autres défendeurs, comme *usufruitière universelle* de son mari.

Le tiers-saisi prétend que l'*usufruitière universelle* doit être assimilée au *légataire particulier*, et il veut limiter, en conséquence, l'étendue de sa responsabilité.

Cette thèse, que l'usufruitière universelle ne doit pas être considérée comme une légataire à titre universel, et porter la même responsabilité, est soutenue sous l'empire du Code Napoléon par plusieurs auteurs, et notamment par Demolombe et Marcadé qui ont certainement une très grande autorité.

Je n'ai nulle envie de combattre leur théorie et je suis même disposé à

croire qu'elle est vraie sous l'empire du Code Français. Les articles 1003 et 1010 de ce Code me semblent leur donner raison.

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Mais, je crois que cette thèse est insoutenable dans notre droit.

Il est vrai que l'art. 873 de notre Code est la reproduction presque textuelle des articles 1003 et 1010 du Code Français; il est vrai encore que notre article 474 reproduit l'article 612 du Code Napoléon; mais ce dernier ne contient pas les dispositions de notre article 876, ce qui constitue une différence importante entre les deux législations.

"Le légataire de l'usufruit donné comme legs universel, ou à titre universel, est tenu personnellement envers le créancier des *dettes* de la succession, *même des capitaux*, en proportion de ce qu'il reçoit, et aussi hypothécairement pour ce qui affecté les immeubles tombés dans son lot, *le tout comme tout autre légataire aux mêmes titres* et sauf les mêmes recours."

Voilà le texte de notre article 876 et s'il existait dans le Code Français, je ne crois pas que Demolombe et Marcadé eussent jamais songé à assimiler le légataire particulier et l'usufruitier universel. Car il est parfaitement évident, surtout si l'on rapproche cet article 876 de l'art. 735, que dans notre droit l'*usufruitier universel* doit être assimilé au *légataire à titre universel*, et porter la même responsabilité.

Ainsi, il y a dans notre législation, trois classes de personnes qui sont chargées du paiement des dettes d'une succession à des titres divers et dans des proportions diverses. 1o. Les héritiers et les légataires universels qui sont personnellement tenus même *ultra vires haereditatis*; 2o. Les légataires à titre universels et les usufruitiers universels, et à titre universel, qui *sont tenus personnellement*, en proportion de ce qu'ils reçoivent de la succession; 3o. Les héritiers particuliers qui ne sont obligés qu'au cas d'insuffisance des autres biens et seulement jusqu'à concurrence de leurs legs.

Comme on voit, la différence entre l'usufruitier universel et le légataire particulier est fondamentale, et notre Code, sur ce point, diffère également de l'ancien droit et du nouveau droit français. Les autorités citées par l'intimé au soutien de sa thèse ne peuvent avoir d'application à la présente cause, et ne sauraient prévaloir en face de la *responsabilité personnelle* expressément mise à la charge de l'usufruitier universel par l'art. 876 de notre Code.

Mais, dit l'intimé, cette responsabilité n'est pas illimitée comme celle du légataire universel; elle est proportionnée à la valeur relative de l'usufruit, et cette valeur n'ayant pas été déterminée, la proportion n'ayant pas été établie, le jugement n'est pas exécutoire contre l'usufruitière. Ce n'est qu'un jugement préparatoire consacrant sa responsabilité en principe, sauf à fixer ensuite l'étendue de cette condamnation, et les demandeurs, avant de la traiter comme débitrice personnelle, devaient faire fixer le chiffre de sa contribution.

Ce raisonnement parait spécieux, mais ne peut avoir aucune valeur en face d'un jugement qui condamne l'usufruitière conjointement avec les deux autres défendeurs au paiement de la somme de $5159.48 avec intérêt et dépens.

Si ce jugement n'est pas exécutoire, je ne sais plus quand un jugement sera exécutoire.

Mais, demande l'intimé, l'usufruitière sera-t-elle tenue pour le tout?

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Non! puisque la condamnation n'a pas été solidaire et que la loi elle-même ne prononce aucune solidarité contre les légataires, ni contre l'usufruitière.

Faudra-t-il, alors, diviser en trois parts viriles le montant du jugement et en mettre une part, c'est-à-dire un tiers de la dette, à la charge de la défenderesse?

Je le crois, et c'est la règle de droit que, lorsque plusieurs défendeurs sont condamnés sans solidarité, la dette se divise de plein droit entre eux en parts égales.

Nul doute que la condamnation eût pu être différente, et que si des procédures eussent été prises par la défenderesse à cet effet, la proportion payable par elle eût pu être autrement déterminée. Comme nous l'avons démontré, la responsabilité personnelle de la défenderesse ne fait aucun doute dans notre droit, mais comme cette responsabilité est limitée à la proportion de ce qu'elle a reçu, elle aurait pu, en réponse à l'action des demandeurs, faire connaître les biens dont elle jouit comme usufruitière, en faire la preuve par un inventaire, faire estimer la valeur de la nue-propriété et celle de l'usufruit, et faire fixer ainsi sa contribution aux dettes, suivant l'art. 474 de notre Code.

Pourquoi ne l'a-t-elle pas fait? Probablement parceque cette contribution eût pu être égale ou excéder le tiers qu'elle est maintenant condamnée à payer.

L'intimé dit encore que c'était aux demandeurs à faire fixer la contribution de la défenderesse par une ventilation de la valeur du capital et de l'usufruit. Mais cette prétention n'est pas fondée en droit.

C'est la défenderesse qui doit bien connaître les forces de succession, qui a dû en faire l'inventaire, qui en devra compte et qui, par conséquent, doit faire la ventilation, si les dettes sont une charge trop onéreuse pour elle, et si elle ne peut s'entendre avec les nus-propriétaires pour leur acquittement.

C'est pourquoi Pothier dit en son *Traité des Successions*, chap. v., art. iv, que les créanciers de la succession ont une action personnelle contre chacun des successeurs universels pour la part que chacun d'eux a dans les biens de la succession, et que si cette part n'est pas liquidée et constatée par une ventilation, les créanciers ont une action contre chacun d'eux pour une portion virile.

C'est encore ce qu'il soutient à l'art. II précédent, qui s'applique aux légataires universels et à titre universel et dans lequel il dit: "Que pour qu'ils ne soient tenus des dettes que jusqu'à concurrence des biens auxquels ils ont succédé, il faut qu'ils en aient fait constater la quantité par un inventaire, ou quelqu'autre acte équivalent, s'ils s'en sont mis en possession, sans cela, et qu'ils aient disposé des biens, ils seront tenus indéfiniment des dettes, et ils ne seront pas tenus pour s'en décharger à offrir d'abandonner et de tenir compte des biens, s'étant mis par leur faute hors d'état d'en pouvoir constater la quantité; c'est le sentiment commun."

Donc la défenderesse est tenue personnellement, tant en vertu de la loi qu'aux termes du jugement prononcé contre elle, pour une portion virile de la dette des demandeurs, c'est-à-dire pour un tiers.

L'intimé est tombé dans une autre erreur quand il soutient, qu'en vertu du jugement rendu, les demandeurs ne peuvent saisir que les biens de la succession et non pas les biens personnels de la défenderesse.

Il semble assimiler la qualité d'usufruitière à celle des tuteurs, curateurs et

autres administrateurs dont les biens personnels ne peuvent être saisis-exécutés pour les dettes de leurs pupiles et administrés. Mais il n'y a aucune similitude.

L'usufruitière jouit pour elle-même des biens de la succession ; elle représente pour sa part cette succession même, et notre Code la déclare *personnellement tenue* aux dettes. Sa responsabilité est limitée à une certaine proportion, comme celle de tous les successeurs universels ; mais cette responsabilité est *personnelle* et s'étend à ses biens personnels comme à ceux de la succession.

Les principes de droit établis, il faut en conclure que le tiers-saisi était tenu de déclarer non-seulement ce qu'il pouvait devoir à la succession Laurent, mais encore ce qu'il devait à la défenderesse personnellement.

Voyons maintenant quelles ont été les procédures adoptées contre lui par les demandeurs, et comment la Cour de première instance en a disposé.

Le tiers-saisi, intimé, a fait une première déclaration, et par suite d'une interprétation erronnée de la loi, il a cru ne devoir déclarer que ce qu'il devait à la défenderesse comme usufruitière.

Les demandeurs auraient pu obtenir de la Cour Supérieure un ordre enjoignant au tiers-saisi de compléter sa déclaration en y ajoutant ce qu'il pouvait devoir à la défenderesse personnellement.

Au lieu d'adopter cette procédure, les demandeurs ont préféré contester de suite la déclaration, et, ce n'est qu'après cette contestation qu'ils ont, avec la permission de la Cour, interrogé le tiers-saisi, de manière à lui faire faire une déclaration additionnelle.

Dans cet interrogatoire le tiers-saisi a objecté à toutes les questions qui tendaient à prouver quelque créance personnelle de la défenderesse contre lui, et le juge a d'abord maintenu ces objections. Nous croyons qu'ici c'est le juge qui a eu tort et que les questions rejetées (pp. 33 et 34 du factum des appelants) auraient dû être permises.

Mais, à la dernière objection, le juge a décidé autrement, et permis la question des demandeurs sur ce que le tiers-saisi pouvait devoir à la défenderesse personnellement.

Voici quelle a été la réponse du tiers-saisi :

"Je ne suis pas prêt à répondre à cette question, parceque je dois quelqu'argent à madame Laurent et qu'elle me doit de son côté ; nos comptes n'ont jamais été réglés."

Que devaient faire alors les demandeurs ? Il me semble qu'ils devaient mettre le tiers-saisi en demeure et lui donner le temps de régler ses comptes avec la défenderesse, puis lui faire ordonner de compléter sa déclaration dans un certain délai.

Au lieu de cela, les demandeurs ont produit des moyens additionnels de contestation, et ils ont demandé jugement contre le tiers-saisi sans autre preuve.

Ce procédé n'était pas illégal et les demandeurs étaient bien libres de l'adopter, s'ils étaient en état de faire une preuve satisfaisante des allégués de leur contestation.

Mais s'ils ne pouvaient pas faire cette preuve comme on peut le croire d'après l'état du dossier, ils devaient prendre des mesures pour obtenir du tiers-saisi une *déclaration complète*, ou pour le mettre régulièrement et définitivement *en défaut*.

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C'est ce que les demandeurs n'ont pas fait, et je crois que, sous ce rapport, leur manière de procéder a été défectueuse.

La Cour Supérieure ne pouvait maintenir la contestation, puisqu'elle n'était pas appuyée de preuve suffisante; mais d'autre part, je crois qu'elle n'aurait pas dû disposer définitivement de la saisie-arrêt, mais ordonner au tiers-saisi de compléter sa déclaration. Car d'un côté, il y avait une contestation sans preuve suffisante et, de l'autre côté, il y avait une déclaration incomplète et un interrogatoire erronnément limité par le juge.

Sous ces circonstances, voici le jugement:

1o. Confirmant le jugement de la Cour Supérieure, renvoyant la contestation, mais sans frais.

2o. Condamnant chaque partie à payer ses frais devant la Cour d'Appel.

3o. Ordonnant transmission du dossier devant la Cour Supérieure, pour y être procédé ultérieurement sur la saisie-arrêt, après la mise du tiers saisi *en demeure* ou *en défaut* de compléter sa déclaration.

R. & L. Laflamme, pour appelants.

Loranger & Loranger, pour l'intimé.

Hon. T. J. J. Loranger, conseil.

(R.L.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 20TH DECEMBER, 1879.

Coram HON. SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 93.

THE CORPORATION OF THE COUNTY OF DRUMMOND, APPELLANT;

AND

THE SOUTH EASTERN RAILWAY COMPANY, RESPONDENT.

HELD:—(Reversing the judgment reported in 22 L. C. J., p. 25), that the railway of an incorporated company may be seized and sold, in execution of a judgment in favor of a mortgage creditor.

TESSIER, J., (*dissentiens*):—

La Corporation du comté de Drummond, porteur d'un montant de $50,000 de débentures ou bons de la Compagnie dite "*The South Eastern Railway*," a obtenu jugement contre cette Compagnie pour $14,490.

En vertu de ce jugement une portion de ce chemin de fer, située dans 3 districts judiciaires, a été saisie par le shérif de l'un de ces districts, et annoncée pour être vendue comme un immeuble ordinaire.

La Compagnie du chemin de fer en question a produit une opposition afin d'annuler cette saisie, en alléguant certaines irrégularités dans cette saisie, et spécialement que la saisie d'un chemin de fer avec son roulant (rolling stock) est nulle.

C'est sur ce dernier point que le jugement de la Cour Inférieure a été rendu, et je ne parlerai que de celui-là.

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Un chemin de fer construit par une corporation privée ou par des individus sur un terrain leur appartenant en toute propriété, sans une expropriation forcée des terrains en vertu de l'autorité publique et sans aucun subside du Gouvernement, pourrait être susceptible d'être vendu par décret judiciaire ordinaire, mais dans la présente cause le terrain a été acquis, par expropriation des individus propriétaires, en vertu des Statuts publics qui ont permis de fixer la valeur de chaque lisière de terrain exproprié, eu égard à la valeur que donnerait au reste du terrain de chaque propriétaire l'exploitation du chemin de fer; en second lieu la Compagnie a reçu un subside du Gouvernement à condition de tenir ce chemin en opération.

Il suit de là qu'il faut distinguer d'un côté ce que l'on appelle vulgairement les *franchises* de ce chemin consistant dans les priviléges de l'exploiter, et dans l'obligation de le tenir ouvert au public, et d'un autre côté la nue propriété du terrain sur lequel est construit le chemin de fer. Ces deux classes de droits, de priviléges, de devoirs et de responsabilités se trouvent conférées dans une Compagnie incorporée en vertu de certains Statuts de la Législature.

Il est bon d'examiner maintenant ce qui est saisi. C'est en termes abrégés: "une lisière de terrain de 66 milles de long sur 66 pieds de large, avec les "bâtisses et avec le roulant de la dite Compagnie, "*rolling stock*," et dépendances," situés dans 3 districts judiciaires à partir de la ville de Sorel à aller vers la ligne du Grand Tronc, mais sans indiquer les tenants et aboutissants, le rang ou la localisation de chaque terrain. Je pose donc les questions suivantes pour être plus précis:

1. Le chemin de fer en question avec ses priviléges, devoirs et responsabilités, est, pris dans son ensemble, dans le domaine public, et n'est pas transmissible par les voies ordinaires de vente privée ou vente judiciaire.

2. L'hypothèque de la Corporation du comté de Drummond n'est pas nulle, elle existe, mais elle n'est pas exécutoire de la même manière que l'hypothèque ordinaire, mais d'une manière différente pourvue par nos lois.

3o. L'exécutoire de cette créance hypothécaire ou de toute autre créance contre le chemin de fer ne peut avoir lieu qu'au moyen d'une saisie des revenus, ou d'un séquestre, pour mettre les revenus devant la Cour et les distribuer à chacun suivant son rang, privilége ou hypothèque, ou par un acte législatif qui dissolve la corporation, si elle est devenue incapable de remplir le but pour lequel elle a été créée.

Sur la première proposition, il est bon de référer à tous les statuts qui ont constitué l'existence de cette corporation et les conditions qui s'y trouvent. On les trouve cités dans les notes de M. l'hon Juge Dunkin qui a rendu ce jugement.

Le dernier de ces statuts 36 Vict., ch. 51, s. 2, contient cette disposition importante: "all *classes* of bond-holders having mortgage on any real estate of "either company shall continue to have unimpaired and be maintained in their "several rights as though this Act had never been passed." Comment les différentes classes de prêteurs, "bond-holders," sont-elles protégées, s'il est permis à un seul, peut-être du dernier créancier, de faire vendre le tout ou une portion principale du tout?

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Les terrains n'ont été expropriés qu'en déduisant la valeur donnée au reste du terrain de l'exproprié, et à la condition de ne s'en servir que pour un chemin de fer, et que si l'on ne s'en sert pas pour cet objet, le terrain retournera au propriétaire exproprié. Toutes ces conditions statutaires fondées sur l'ordre public ne sont-elles pas mises de côté par le décret du shérif, sans ces conditions?

Le décret judiciaire produisait la dissolution *de facto* de cette corporation en lui enlevant l'objet pour lequel elle a été créée, le fonds sur lequel elle est assise et sans lequel elle ne peut exister. Il me semble que ceci ne peut avoir lieu que par l'intervention de l'autorité législative. Notre Code Civil, art. 369, semble l'indiquer en statuant: "Les corporations séculières, d'un caractère "public, ne peuvent se dissoudre par consentement mutuel, sans un abandon "formel et légal ou sans l'autorité de la Législature. Il en est de même des "compagnies de chemin de fer, de canaux.....et généralement de toutes les "corporations privées qui ont obtenu des priviléges exclusifs."

L'hypothèque en France est la même qu'ici.

Quelle est la jurisprudence là? On trouve une décision prononcée par le tribunal de la Seine le 27 juillet 1850, dans l'instance de Legrain contre le chemin de fer de Sceaux à Paris, Dallos Recueil périodique, année 1851, cinquième partie p. 78, s. 8.

"Décidé que les chemins de fer, n'étant pas susceptibles d'une propriété "privée, ne peuvent être l'objet d'une expropriation forcée de la part des créan-"ciers de la compagnie concessionaire, ni même des anciens propriétaires du "sol."

Férand-Giraud, Législation des chemins de fer, p. 16, 18, dit: "C'est ainsi "que les chemins de fer faisant partie de la grande voirie sont considérés comme "des dépendances du domaine public."

En comparant les articles 369, 399, 400 et 405 de notre Code, il semble que la même doctrine doit prévaloir ici.

La même doctrine a été maintenue dans une cause jugée à Québec, dernièrement rapportée au vol. 5, p. 99, des Rapports Judiciaires de Québec, de Wason vs. Le chemin de fer de Lévis & Kennebec. Ceci me paraît conforme aux décisions données en Angleterre, entr'autres à la cause de Gardner vs. The London & Chatham Railway Company, en 1866, rapporté au 2e vol. Law Reports Chancery Cases p. 215, 217.

Quoiqu'une doctrine différente parait exister aux Etats-Unis, elle a élevé là beaucoup de difficultés, et il a fallu toujours recourir à une législation spéciale, ainsi le dit Redfield on Railways, vol. II p. 502.

Il est vrai qu'il existe un jugement rendu par la Cour Suprême du Canada 1 vol. p. 737, Bickford & The Grand Junction Railway Company, dans lequel il semble que le "mortgage" d'un créancier a été maintenu, mais en lisant ce rapport au long, on verra que cette Cour a évité de se prononcer sur le mode exécutoire de ce "mortgage," quant à la partie du chemin qui constitue "le chemin de fer" ou les franchises du chemin de fer.

Le Juge de la Cour Suprême en rendant le jugement, 1 vol. Supreme Court Reports p. 737, a dit: "Therefore conceding for the present that the mortgage, if "confined to the franchise, and to the railway and its adjuncts, would have been

"void as being a charge on subjects *extra commercium*, it does not follow that "it may not be a good charge *on other lands* over which the company had "power of free disposition, and for that reason alone the order of the Court below "should be reversed."

"I think there was much force in the argument that a Court of Equity "would give effect to such an instrument, *at least to the extent* of treating it "as a good, equitable charge *upon the net earnings* of the railway."

Et à la page 738 le juge ajoute :

"Very high American authority, including that of the Supreme Court of the "United States, points to one solution of this difficult question, whilst English "decisions maintain the opposite view.

Plus loin le Juge ajoute :

"We express no opinion on this point, other grounds suffice to decide this "appeal, but it was thought right to notice the argument and to say that we "still consider it an open question, which this Court may yet be called upon to "decide without any prejudice from the present determination."

Sur la 2me question : L'hypothèque n'est pas nulle, mais elle est exécutoire d'une manière différente. Cela ne provient pas de ce que l'hypothèque n'est pas bien stipulée, mais de la nature de l'objet ou de la chose, affectée à l'hypothèque.

Le but de l'hypothèque n'est, après tout, pour le créancier, que d'être colloqué par préférence sur le produit de la chose.

Ce droit de propriété du terrain n'est vraiment qu'une servitude de passage, et c'est le produit de l'opération de cette servitude qui en forme la valeur. Le droit de la Compagnie du chemin de fer n'est qu'un droit limité de propriété pour l'exercice d'une servitude de passage, tandisque le décret ou vente par le shérif que la demanderesse veut faire, confère un droit de propriété absolu. Code Civil, art. 405.

Les conséquences d'un décret judiciaire pour toutes les compagnies de chemin de fer, ou autres compagnies semblables, sont d'une nature bien sérieuse.

D'après la doctrine adoptée par la majorité des juges de cette Cour, il s'en suit que le premier créancier venu peut faire enregistrer un jugement contre la compagnie condamnée, par exemple contre la compagnie si importante du chemin de fer du Grand Tronc du Canada, et sans le consentement du gouvernement ni des créanciers préférentiels ou privilégiés faire saisir et vendre la partie de ce chemin qui se trouve dans cette Province de Québec.

Cependant l'un des savants juges de cette Cour aurait observé dans la cause de Morrison vs. The Grand Trunk Railway Company, 15 L. C. Jurist, p. 318 :

"There would be probably no great temerity on the part of any individual or "of any tribunal in asserting that the disposal of the Grand Trunk Railway, "by sheriff's sale, either in whole or in part, must be held in the present state "of our law a practical impossibility."

Sur le 3me point. L'exécution de la créance sur cette propriété n'est qu'au moyen d'une saisie-arrêt, ou par la nomination d'un séquestre judiciaire en vertu des articles 876, 878, 880, 883, Code de Procédure Civile. Ceci équivaut à la nomination d'un *receiver*, et c'est le seul mode pratiqué et utile indiqué par nos lois. Notre Code de Procédure présente un article nouveau à ce

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sujet qui peut s'appliquer dans cette cause, c'est l'article 645: "Si la vente est "arrêtée par quelqu'opposition, le saisissant peut, suivant les circonstances et à "la discrétion du tribunal, obtenir la nomination d'un séquestre pour en "percevoir les revenus."

Les articles 1823 et 1826 du Code Civil démontrent qu'il peut y avoir séquestre des immeubles aussi bien que des meubles; il est pourvu dans ces articles à l'administration des biens séquestrés, au droit de les louer, à la distribution des deniers en Cour entre ceux qui y ont droit. Ceci me paraît devoir suffire à protéger les droits d'un créancier hypothécaire, sans nuire aux autres créanciers et sans détruire la propriété au préjudice du public et de tous les intéressés.

Je termine en citant les paroles du savant juge Lord Cairns dans la cause précitée de Gardner vs. London and Chatham Railway:

"The living and going concern thus created by the Legislature must not "under a contract pledging it as security, be destroyed, broken up or annihila-"ted. The tolls and sums of money *ejusdem generis*, that is to say, the earn-"ings of the undertaking, must be made available to satisfy the mortgage, but "in my opinion, the mortgagees cannot by seising the lands..... reduce it into "its original elements."

C'est l'avis que j'adopte, je le crois plus conforme aux intérêts des créanciers et des débiteurs et de toutes les parties intéressées, et d'accord avec nos lois. Je suis donc d'opinion de confirmer le jugement rendu en Cour Inférieure.

Sir A. A. Dorion, Ch. J. La législature en autorisant la construction du chemin de fer des comtés de Richelieu, Drummond et Arthabaska, a en même temps, autorisé la compagnie à hypothéquer le chemin ainsi que toutes ses dépendances pour sûreté des *bonds* qu'elle émettrait.

Or l'art. 2016 dit: "l'hypothèque est un droit réel sur les immeubles affectés "à l'acquittement d'une obligation, en vertu duquel le créancier peut les faire "vendre en quelques mains qu'ils soient, et être préféré sur le produit de la vente "suivant l'ordre du temps, tel que fixé par le Code."

La loi n'a pas pourvu à donner aux porteurs d'hypothèques sur les chemins de fer d'autre recours que celui donné par le Code Civil à tout créancier hypothécaire.

En Angleterre l'on a refusé de permettre la vente des chemins de fer, mais que l'on remarque que l'acte des chemins de fer n'est pas semblable au nôtre. De plus, là, le créancier en vertu de son *mortgage* peut se faire mettre en possession de la propriété *mortgagée*, et les tribunaux sans précisément mettre les créanciers en possession du chemin de fer qui leur est hypothéqué, nomment un officier qu'ils appellent *receiver*, et qui perçoit les profits du chemin dans l'intérêt des créanciers et des autres intéressés. (South Eastern Railway & Jordan, 6 House of Lords, 425. Gardner & The London, Chatham & Dover Railway Co., L. R., 2 Ch. 201.)

Dans la cause de Morrison et The Grand Trunk Railway of Canada, 5 L.C. J., 313), la Cour Supérieure a refusé la demande faite par un créancier de nommer un séquestre.

Si le créancier hypothécaire ne peut saisir et faire vendre le chemin qui lui a été hypothéqué conformément à la loi, il aurait un privilége parfaitement inutile

puisqu'il ne pourrait l'exercer en la seule manière dont l'on exerce une hypothèque en vertu du Code.

Aux Etats Unis, où le *mortgage* confère au créancier les mêmes droits qu'en Angleterre, les tribunaux permettent la vente des chemins de fer à la poursuite des créanciers à *mortgage*.

Dans la cause de Bickford & The Grand Junction Railway Co., 1 Supreme Court Rep. 738, M. le juge Strong, tout en déclarant que la cour considérait que la question était ici indécise et sujette à discussion, s'est exprimé de manière à indiquer qu'il inclinait pour la jurisprudence Américaine.

L'on objecte qu'en France les chemins de fer ne peuvent être ni saisis, ni vendus sur exécution. Cela est vrai, mais seulement depuis que par une loi de 1845, l'on a déclaré que les chemins de fer feraient partie du domaine public qui est insaisissable. En France, les compagnies de chemin de fer ne sont pas propriétaires du chemin même, qui appartient à l'Etat. Elles n'en ont que la possession et le privilége de les exploiter aux conditions mentionnées dans leurs chartes.

L'article 1er du Décret du 15 juillet 1845, que l'on trouve dans Dallos, Rec. Per. 1843, 3, 163, est dans ces termes: "Les chemins de fer construits ou "concédés par l'Etat font partie de la Grande Voirie."

Lors de la discussion de cet article, M. le commissaire du Roi déclara que si les chemins de fer faisaient partie de la Grande Voirie, le sol en était inaliénable.

Il y a eu des chemins de fer qui ont été construits avant la loi de 1845, en vertu de chartes autorisant les concessionnaires à les hypothéquer. (Christolphe, Traité des Travaux Publics, t. 1, p. 597, 8).

L'on trouve dans Sirey, 1850, 2, 599 un arrêt du tribunal civil de la Seine, qui a décidé catégoriquement que "les chemins de fer ne peuvent être l'objet "d'une expropriation forcée de la part des créanciers de la compagnie concession-"naire, même de la part des anciens propriétaires du sol cédé pour l'établisse-"ment du chemin."

L'un des motifs de ce jugement est, "que le concessionnaire du chemin de "fer n'en étant pas propriétaire, l'expropriation ne peut être poursuivie sur lui."

Sirey fait sur cet arrêt les observations suivantes:

Note 1. "Mais le droit à la concession du chemin de fer considéré comme un "droit immobilier ou espèce d'usufruit, ne pourrait-il pas être saisi? Nous "serions assez portés pour l'affirmative, toute réserve faite d'ailleurs des droits "tels quels de l'Etat."

C'est surtout parce que les chemins de fer en France ont été déclarés propriété publique et qu'ils n'appartiennent pas aux compagnies concessionnaires qu'on ne peut les vendre sur elles. (Christolphe, t. 1, p. 594, No. 706; p. 598, No. 708); aussi a-t-il été jugé que ces compagnies n'étaient pas passibles de la contribution foncière. (Idem, p. 599, No. 700.)

Dans la Province de Québec les chemins de fer n'ont jamais été considérés autrement que comme étant des propriétés privées dont les propriétaires, les compagnies concessionnaires, sont assujetties envers le public à certaines obligations qui leur sont imposées par leurs chartes et par l'acte concernant les chemins de fer de Québec, 32 Vic. ch. 51.

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Les compagnies achètent en leur propre nom les terrains dont elles ont besoin pour construire leurs chemins (Ibidem, s. 7.) Ces terrains sont sujets au paiement des taxes municipales. (Code Municipal, art. 720.)

Les compagnies de chemin de fer ont même été condamnées à payer des lods et ventes sur le prix de terrains qu'ils avaient acquis avant l'abolition de la tenure seigneuriale. (Kierzkowski & Le chemin de Fer le Grand Tronc du Canada, 10 Rap. Jud. du B. C., 47.)

Dans cette cause deux des juges, M. le juge-en-chef Lafontaine et M. le juge Meredith, maintenant juge-en-chef de la Cour Supérieure, ont même été d'opinion que la compagnie défenderesse devait payer aux seigneurs l'indemnité seigneuriale due par les mains-mortes. Or, l'on n'a jamais payé de droits seigneuriaux ni d'indemnité seigneuriale pour les terrains requis pour un chemin public, une rue, ou une route.

Cela démontre que les chemins de fer ne font pas partie de la Grande Voirie, et par conséquent du domaine public, comme ils le font en France, mais qu'ils sont des propriétés privées, et que comme telles, elles sont sujettes à expropriation pour les dettes des compagnies qui en sont propriétaires, et, à plus forte raison, des dettes que les compagnies ont été autorisées, comme dans le cas actuel, à assurer au moyen d'une hypothèque spéciale sur le chemin même, et sur toutes ses dépendances.

L'on croit faire une objection sérieuse en disant que la charte qui est un octroi du pouvoir souverain ne peut être aliénée sans le consentement de l'autorité qui l'a octroyée. Mais qu'est-ce que la charte ? C'est le titre même qui désigne l'ensemble des droits et priviléges conférés à la compagnie concessionnaire, et des obligations qui lui sont imposées.

Mais est-ce que toutes les chartes de chemin de fer n'autorisent pas les propriétaires de chemin de fer à céder et transporter leurs droits et priviléges en les autorisant à céder les parts et actions que chaque actionnaire peut avoir dans la compagnie ?

Et lors même que ce droit ne leur serait pas spécialement accordé par la charte, ne faudrait-il pas une défense expresse pour priver un propriétaire du droit de vendre ou céder sa propriété, et si tous les actionnaires d'une compagnie de chemin de fer cèdent leurs actions à d'autres actionnaires, est-ce que tous les droits et toutes les obligations ne passent pas à ces nouveaux actionnaires, comme s'ils avaient acheté le chemin même. Supposons maintenant qu'un seul particulier soit assez riche pour acheter toutes les actions d'un chemin de fer, est-ce qu'il ne deviendra pas propriétaire de tout le chemin y compris les priviléges y attachés, et sujet à toutes les obligations imposées par la charte.

Quelle différence y a-t-il à acheter séparément de tous les actionnaires dans une entreprise de chemin de fer, toutes leurs parts et actions, c'est-à-dire tous les droits qu'ils y possèdent, ou d'acheter de la Corporation ou de tous les actionnaires collectivement tous leurs droits dans le chemin. Il n'y a donc aucune différence entre le transfert par les actionnaires individuellement de tous leurs droits, et celui fait collectivement par tous les actionnaires ensemble.

Dans l'un et l'autre cas l'ensemble de leurs droits et obligations, c'est-à-dire la charte, ou si l'on veut " the franchise," est transmise à un ou à plusieurs nou-

veaux propriétaires, tout comme elle le serait si l'entreprise elle-même était transportée à ces nouveaux propriétaires. Lorsqu'une charte est octroyée à une compagnie, elle l'est ordinairement à des conditions qui puissent, dans l'intérêt du public, assurer la construction et l'exploitation de l'entreprise. Il importe peu par qui ce résultat sera obtenu, le public n'y a aucun intérêt, et la plupart du temps, les chartes de chemins de fer sont octroyées à des directeurs provisoires d'une société projetée et dont le personnel est inconnu. Il n'y a donc aucune raison de dire que la charte ou "the franchise" ne peut pas être cédée.

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Un chemin de fer est dans ce pays une propriété d'une nature particulière. Elle est affectée envers le public à toutes les charges imposées par la charte. S'il y a violation des conditions de la charte, cette charte peut être annulée en quelques mains que la propriété soit passée. Toute aliénation d'une telle propriété ne peut être faite que sous les conditions qui l'affectent. Avec cette restriction qui sauvegarde les intérêts du public et les droits des créanciers, il ne peut y avoir aucun inconvénient à l'aliénation de l'entreprise par expropriation forcée, surtout lorsque cette expropriation a lieu à la poursuite de créanciers à qui la compagnie a déjà fait une aliénation partielle au moyen de l'hypothèque qu'elle lui a consenti sous l'autorité de sa charte.

Nous avons vu que même en France où les chemins de fer sont propriété publique, Sirey ne voyait aucune objection à la vente du droit d'exploitation, qu'il considère comme une espèce d'usufruit que les compagnies ont des chemins de fer de l'Etat.

Il ne reste plus qu'à dire que plusieurs chemins de fer ont déjà passé en d'autres mains sans qu'il en soit résulté d'inconvénients. Le chemin de fer de Montréal & Bytown a été vendu par le shérif, et cette vente a ensuite été reconnue par un acte subséquent du corps législatif. D'autres chemins de fer sont passés à de nouvelles compagnies; quelques-uns avant et d'autres après que la cession eut été autorisée par une loi à cet effet.

Quant aux objections qui ont été faites à la forme de la saisie, et aux prétendues irrégularités de la désignation, nous croyons que ces objections sont mal fondées. Les appelants pouvaient ne saisir comme ils l'ont fait que la partie du chemin qui leur était hypothéquée, et ils ont donné une désignation suffisante de cette partie du chemin qui maintenant, en vertu de divers actes de la Législature fait partie du chemin de fer appartenant à la compagnie intimée.

Le jugement de la Cour Supérieure doit donc être infirmé et l'opposition de l'intimé renvoyée avec dépens.

RAMSAY, J.:—Probably there is no doubt what the law ought to be in this matter. The object of granting a charter to a railway company is much more to confer a benefit on the public than to further a speculation. The powers granted to expropriate are an evidence of this. It would therefore have been very wise in the Legislature to have made such provision as would have secured the permanence of the institution. But the question is, has this been done, or, more properly, has not the Legislature done precisely the reverse? The learned judge in the Court below has with great force shown how unwise it is to have given the right to a railway company to hypothecate its line; but I think the very clearness of his exposition shows only the more abundantly how critical the

the printed form of policy then in use by the Company. That by one of such conditions any misrepresentation of or omission to communicate any circumstance which is material to be made known to the Company, the insurance should be of no effect. That long previous to said 4th day of June, 1877, the plaintiff had been notified and warned that the store in which said stock in trade was contained was to be set on fire and burnt by a personal enemy. That the fire was the act of an incendiary and the result of said threat. That the plaintiff wholly, wrongfully and illegally concealed said threat from defendant, which, if communicated, would have caused the defendant to absolutely refuse said insurance. And that in consequence said insurance became and was wholly null and void.

By its second plea, the Company contended that the plaintiff had wholly failed, as required by the conditions of such form of policy, to furnish proofs of plaintiff's loss satisfactory to the directors of the Company, on the printed forms in use by the Company, within 30 days from the occurrence of the fire, and that no loss, consequently, ever became payable by said defendant.

The defendant also pleaded the general issue.

The plaintiff, by his special answer to the first plea, alleged, "that the only information he ever received as to any threatened intention of any one to burn the shop in the plaintiff's declaration mentioned was given to him by one Captain Smith, in the month of February, 1877, and during a time of excitement consequent on the municipal election, at which the said plaintiff was a candidate, and which had then recently taken place. That the character of this intima-

by the said statute, do hereby mortgage and hypothecate the real estate and appurtenances hereinafter described that is to say: *The whole of the railroad from.....including all these lands at the termini of the said road, and all lands of the company within the limits and all buildings thereon erected, and all and every the appurtenances thereto belonging.*"

I do not see how it is possible to use stronger words to give an hypothec than these, and to refuse to give them effect appears to me to be simply breaking faith with the bond-holders. It may be very unwise for a bond-holder to press his right in this form, but with his discretion we have nothing to do. An argument was used by the Court below that this bond gave opening to interpretation because of the use of the word mortgage along with the word hypothec. But it should be observed that the word is only made use of "under the power given by the statute," and that in the statute the word hypothec occurs alone. This, then, would control the bond. But in addition to this it is a piece of information almost too simple to require to be insisted on, that the word mortgage has been constantly used in this country as the translation of *hypothèque*. Can it be gravely pretended that in all the English deeds, where the words "doth mortgage and hypothecate," are used, the mortgagee loses his

Company, by the letter herewith fyled as the plaintiff's exhibit number 3, for the first time required of the said plaintiff to make out his claim of loss on one of such printed forms, which the said Company enclosed in said letter for that purpose.

That, moreover, until such printed form was so furnished by said Company to the plaintiff it was completely out of his power to make proof of his loss in that form, he not being in possession of any such form and none such having been previously offered or tendered to him by said Company or its agents.

That immediately on the receipt of said letter, the said plaintiff caused the said form so furnished by said Company to be filled up and completed in all respects according to its requirements, and forwarded the same without delay to the said Company, defendant, which duly received the same.

That even after the receipt by the said Company of the said form so filled up and completed, the said Company, by another letter, of date the 27th day of September last (herewith produced and fyled as the plaintiff's exhibit No. 4), required further information regarding the said fire and loss, and a further certificate by a magistrate in the neighbourhood of the fire, and to that end enclosed an additional form which the said plaintiff caused to be filled up and completed as required by said Company, and the said plaintiff did also furnish all the information required by said last mentioned letter which was within his knowledge, control or power. And he, the said plaintiff, hath in all respects conformed to the demands and requirements of said Company regarding said fire and loss to the best of his power and ability.

And the said plaintiff saith, that in all that the said Company, defendant,

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their highly-organized administrative system; but, so far as I have been able to become acquainted with it, I should not be prepared to say it was not the same as that laid down by the Lords Justices. They follow there the express law of the charters of the railways. They are called concessions, and really they amount to no more than a terminable right of *exploitation*. In one of the French cases, cited by the learned judge in the Court below, I find the holding to be in these words: "Les chemins de fer *construits ou concédés par l'Etat* sont une dépendance du domaine public, et ne sauraient des lors appartenir aux compagnies concessionnaires, *qui n'en ont que l'exploitation*," (Dalloz 1861, p. 225, 1st col.) And so the property of the company is movable. In any case we could not here consider railways as forming part of the public domain. At Quebec some little time ago we held the G. T. Railway liable for a local tax, part of which was to be applied as a subsidy to another railway company.

As for the law in the "greatest railway country in the world," as appellant's counsel enthusiastically designates the United States, so far as I have been able to understand the law, the rights of bond-holders are determined by the terms of their bonds.

I would therefore reverse.

Curry vs. The Commonwealth Ins. Co., 10 Pickering's R. 525, in support of the proposition that there had been concealment of a material fact. And *Bethune*, Q.C. (for plaintiff), cited against the proposition May on Ins. § 209, p. 220, and, in support of the question of waiver, Dill vs. The Quebec Fire Ins. Co., 1 Rev. de Leg. 113; Pine vs. Reid, 6th Man. & Gr. 1, and specially the ruling of Ch. J. Tindal at p. 10; Goodwin and The Lancashire Fire Ins. Co., 18 L. C. J. 1; Angell on Fire Ins. § 242 and 248; Clarke, Fire Ins., 235-236-237.

JOHNSON, J. In this cause the action was brought to recover $2,000 for a loss by fire under an interim agreement to insure the stock in trade of the plaintiff, and the defendants pleaded, admitting the contract, but alleging it to have been made subject to the conditions of the Company's policies, one of which was that there was to be no recourse if there was any misrepresentation, or omission to communicate any circumstance material to be made known to the insurer; and that, previous to the contract, the plaintiff had been warned that the store was to be set on fire by an enemy, and that the fire was, in fact, the result of the threat or warning; and the plaintiff concealed the fact from the Company, which, if it had been known to them, would have prevented them from insuring. There was a second plea under which the Company contended that the plaintiff had failed to furnish proof of his loss to the satisfaction of the Company on the printed forms in use, and in conformity with another condition of the policy, within 30 days from the occurrence of the fire. The plaintiff made special answers to both of these pleas. To the first he said that during the excitement of a municipal election, at which he was a candidate, he had been

"but, in respect of liability incurred for any torts, wrongs or other things done "by either Company, before this Act shall come into effect, as contra-distin- "guished from the separate obligations or debts contracted by either Company, "the property, assets and effects, whether real or personal, of such separate "Company, existing and belonging to it at the time this Act shall come into "effect, shall alone be held bound, and shall be liable to be attached, seized "and taken."

The Corporation of the County of Drummond, the now respondents, being the holders of fifty of the debentures of $100 each of the Richelieu, Drummond and Arthabasca Counties Railway Company, sued the amalgamated Company, now respondents, and recovered judgment against them for $14,490, arrears of interest due on their Bonds; under which judgment they issued execution and caused to be seized that part of the Railway of the united Companies which was to have been constructed by the Richelieu, Drummond and Arthabasca Counties Railway Company, and which the last named Company had specially hypothecated to secure the payment of their debentures.

The Company defendant in the cause, and now respondents, opposed the seizure, claiming its nullity on various grounds.

is complete on all points. The so-called threat was apparently one of those senseless things that reckless men say at times of excitement to show their fitness for free institutions. No one attached any importance to it; and, such as it was, it referred to that very night, which not only passed away without harm, but the application for insurance itself was only made four months afterwards.

As to the second point, it seems to have been virtually abandoned by the Company itself.

The evidence of Alexander Taylor shows that the agent of the Company, when certain invoices were produced which the Company had called for, stated that he had all that was required to lay before the Board, and the claim was resisted solely on the ground of the non-disclosure of the threat. The doctrine with respect to furnishing proofs within a stipulated time was enforced in the case of Whyte v. The Western Assurance Company. That doctrine never extended to saying there could be no waiver; but merely applied the stipulation where there was nothing to modify it. We therefore confirm the judgment which was given for the plaintiff.

Judgment of S. C. confirmed.

Bethune & Bethune, for plaintiff.
Davidson & Monk, for defendant.
(S.B.)

1st. It is a quasi-public property.

2nd. It is inseparable from the corporate franchise.

But in this case it is not the public or any representative of the public interest that objects to the sale. If that interest were of a definite tangible character it is to be presumed there would be a public functionary who would assert the right, and claim that it should be preserved; on the contrary, it is the debtor himself who objects. He cannot deny that he borrowed the money of the creditor now seeking redress; that he used it in the construction of the road, which is the only property remaining to represent the value furnished by the creditor; but he says to the creditor: I have converted your money into property which is not seizable, into something in which the public have an interest, and I have a right, in common with other members of the community, to protect the public interest.

This is an argument that equity will reject, and common sense must repudiate. It would require something beyond the vague idea of public policy to give it force, and, in the absence of positive law to support it, I think it undeserving of serious consideration.

Vaillancourt fit ensuite saisir la propriété délaissée. C'est alors que le syndic de Bellefleur produisit une tierce-opposition réitérant contre Collette les allégations de son action révocatoire, et demandant effectivement que les deux causes fussent jointes (et il en avait le droit, car elles étaient connexes), et attaquant la saisie et le jugement de Vaillancourt en autant que la créance était éteinte. La vente fut en conséquence arrêtée.

La Cour de Révision, par son jugement de mai 1880, a maintenu la tierce-opposition de Perrault en autant qu'elle avait trait à la demande révocatoire portée contre Collette, et l'a renvoyée en tant qu'elle concernait Vaillancourt, avec dépens contre Perrault en faveur de Vaillancourt ou plutôt de ses procureurs.

L'obstacle qui s'était opposé à la vente de la propriété saisie ayant été levé, cette vente eut lieu, et les deniers sont maintenant rapportés pour distribution.

Le rapport de distribution est préparé et M. Nantel, comme cessionnaire de MM. Ouimet, Ouimet et Nantel, les avocats distrayants, n'ayant pas été colloqué des frais encourus sur la tierce-opposition tant en cour de 1ère instance qu'en Cour de Révision, conteste cet ordre de distribution et demande à être colloqué par privilége, du montant de ces frais.

Toute la question soulevée par la contestation de la collocation de M. Pierre Beaubien, créancier colloqué, par privilége de vendeur, est de savoir si les frais encourus par Vaillancourt pour faire renvoyer la tierce opposition de Perrault sont privilégiés.

Je n'attache aucune importance à l'objection faite par les avocats de M. Beaubien, que ces frais sont aujourd'hui réclamés par M. Nantel, tandis que

so, the ordinary process of law applies, however inconvenient and unsuitable it may be. It has not been abrogated nor interfered with, and must be enforced when demanded.

There remains the argument of the inseparable nature of the property from the corporate franchise.

What the Legislature had in view was not the perpetuation of a company, and above all, not its protection from the legitimate claims of its creditors, but, by means of the organization of a stock company, the aggregation of a capital which any single individual, or any number of individuals without a law protecting them from individual liability, would be unlikely to furnish. The Government, or in other words, the public were interested in having a railway made. It was indifferent to them who should own and operate that railway.

It may be conceded, that should the property pass by insolvency or sheriff's sale, it would be a question how far the purchaser could deal with it, so as to defeat the public uses to which it has been destined; how far the purchaser would have a right to take up the track and close the road, but that is a question quite different to that which now presents itself.

dure a défini ce qu'on doit entendre par frais de justice, et ils sont colloqués dans l'ordre suivant :

1o. Frais de l'ordre ; 2o.....; 3o. frais encourus sur le bref d'exécution contre les immeubles et ce qui peut rester dû sur la discussion des meubles ; 4o. ..... ; 5o..... ; 6o. *Les frais sur les incidents de la saisie, et nécessaires pour arriver à la vente des immeubles tant en première instance qu'en appel.* Et nos codificateurs citent Pothier, Pigeau, Héricourt, etc,

Voyons ce que dit Pothier : " Les frais *extraordinaires* sont ceux que le pour-" suivant a été obligé de faire sur les incidents survenus pendant le cours de la " saisie réelle ; par exemple les frais sur un appel de la saisie réelle, sur les *oppo-*" *sitions*.....

" Le poursuivant, en faisant ces frais, a géré l'affaire commune de tous les " créanciers.

" Il les a faits dans l'intérêt commun de tous les créanciers, qui avaient tous " intérêt que la saisie fut mise à chef, pour pouvoir être payés de leur créance, " et ces frais étaient nécessaires pour l'y mettre ; il est donc juste que celui qui " les a faits en soit remboursé par préférence.

" On ne doit pas même obliger le poursuivant à se pourvoir *contre ceux qui* " *ont fait les incidents*, et qui *ont été condamnés aux dépens envers lui:* il est " seulement tenu de céder, à cet égard, ses actions aux créanciers sur lesquels " l'ordre manquera, pour, par eux, *les exercer en sa place ainsi qu'ils pourront.*"

Ce dernier passage de Pothier répond à l'objection du créancier Beaubien que le contestant, M. Nantel, n'avait pas établi qu'il n'avait pas été payé par Perfault ni qu'il eut fait des procédures pour se faire payer.

...ange, that the Legislature has reserved any right, beyond what may be specially declared in their enactments; they have made no declaration of such reserve, they would doubtless have vested it in Her Majesty, or in some public functionary appointed to guard it. It would not have been left to the debtor to set it up for his own protection, and to be abused by him to defeat the recourse of his creditors.

No vague suggestion of public interest, made by the debtor interested in obstructing the process against him, can be expected to have much weight with the courts, nor can I see that it could have been reasonably reserved to a public functionary, without suitable provision being made and offered, either to indemnify the creditors, or to make the property of the Company in some way available to satisfy their demands.

To abrogate such a material and well-established right as that of a creditor to execute the property of his defaulting debtor, would require very distinct and positive legislation.

Not only has the Legislature failed to interpose any extraordinary barrier between the creditors of a Railway Company and their debtor, but it has in a very significant manner indicated that some of the ordinary remedies will be

tribunaux en France décident, sous l'opération de l'art. 714 du Code de Procédure, quels sont les frais *extraordinaires* qui seront payés par privilége.

Voir Carré Q. 2399, sur l'art. 714.

" Les frais *extraordinaires* doivent être déclarés privilégiés, dit Carré, lorsque la partie saisie les a occasionnés et qu'elle a succombé."

Voir Lepage, Traite des Saisies, T. 2, p. 102.

Dans la cause actuelle n'est-ce pas le débiteur principal, par son syndic, qui a mis un obstacle à la vente de l'immeuble saisi ? Et en faisant renvoyer la tierce-opposition, le demandeur Vaillancourt n'a-t-il pas agi dans l'intérêt commun en faisant écarter l'obstacle qui s'opposait à la vente ?

Si le créancier Beaubien eut été le poursuivant, au lieu de Vaillancourt, et que le syndic de Bellefleur eut voulu lui faire une mauvaise contestation, comme celle qu'il a faite à Vaillancourt, en alléguant que sa créance était payée ou éteinte, est-ce que M. Beaubien n'aurait pas été obligé de faire les mêmes frais que Vaillancourt ? Et prétendrait-il alors que ces frais n'auraient pas été faits dans l'intérêt commun ?

Je suis à me demander où serait la différence et je ne la trouve pas.

Je suis donc d'opinion que les frais encourus par Vaillancourt pour faire renvoyer la tierce-opposition de Perrault sont des frais de justice, et doivent être colloqués comme tels d'après leur rang suivant l'art. 728 du C. de P.

La contestation doit donc être maintenue.

De Bellefeuille & Bonin pour le créancier colloqué.

Champagne & Nantel pour le contestant, et *J. Ald. Ouimet, C. R.*, Conseil.

(G. A. N.)

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the opinion of the Court, remarks: "We confess, that after giving the matter "much thought the doctrine that all railroad mortgages made without the con- "sent of the Legislature are illegal and void, because they may operate as a "permanent transfer of the corporate powers of the original corporators to "another body, seems to us to have little to commend it, and much to condemn "it." See 55 Maine Rep. p. 395 in 1868.

In the work of Pierce, on American Railway Companies, at pp. from 527 to 535, he discusses the subject at considerable length, and falls in with little modification to the view above enunciated. His remarks are very much in point, and will well repay a perusal. In the course of them, and towards the conclusion, he says:—

"It is objected to the power of the Company to mortgage the road, that it is "a public highway. The right of the State to condemn private property for "the road rests upon the ground that it is to be used for public purposes. But "the proposition that the road is a public highway if admitted, would not "require the admission of its disability to transfer the right to use the same.

"The right of the State to have it maintained for public travel and transpor- "tation does not interfere with its management by other parties than the ori-

given him by Trenholme to make the purchase, who afterwards refused to accept and pay for the article which he, McLennan, was consequently obliged to resell, and did so at a loss which with his commission amounted to the sum claimed.

Trenholme by his plea specially negatived each of plaintiff's allegations of fact; he besides pleaded the general issue.

The Superior Court, on the 30th March, 1878, gave judgment for the plaintiff, which judgment is now questioned by the present appeal.

In proof, no writing was produced from Trenholme to authorize the purchase, nor any bought or sold notes to evidence the transactions of purchase and resale.

Trenholme, examined as plaintiff's witness, says that on the 20th April he gave McLennan an order to buy, but not to buy on a falling market. He called the next day, when McLennan told him he had not purchased; he supposed the thing was at an end at that time.

In another part of his evidence he says that when he was next in McLennan's office, he made objections, and told him that he had purchased contrary to his, Trenholme's, orders completely.

On being asked whether it was in purchasing on a falling market that McLennan had disobeyed instructions, he answers: "Not only that, but he purchased at a time after he had no right to do it. I gave him the next day to do it in, and called, and it was not done; I went home and supposed it was at an end."

McLennan's son, a clerk in his office, being examined, cannot state from his personal knowledge the giving of instructions by Trenholme to his father, but says that, being himself in an outer room, Trenholme on leaving his father's

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and administer the whole property of a Corporation like the Grand Trunk Railway. Here we are guided by the express provisions of a statute to which we are bound to give legal effect.

The following was the judgment of the Court:—

"The Court * * * considering that judgment was rendered in this cause on the 24th November, 1876, in favor of the appellants, for the sum of $11,416.00 currency, with interest as therein mentioned, being the amount of certain coupons attached to certain debentures issued by the Richelieu, Drummond and Arthabaska Counties Railway Company, on the 20th day of June, 1871;

"And considering that by the Act of Incorporation of the said Richelieu, Drummond and Arthabaska Counties Railway Company, the said Company was authorised to issue the said debentures and thereby to hypothecate the real estate and appurtenances therein described, being the same which are seized in this cause;

"And considering that the said debentures, on which the said judgment was rendered, were issued in conformity to the provisions of the said Act and the form thereby given, mortgaging and hypothecating the said real estate and appurtenances;

of time within which the order was to be executed, and the restriction of not buying in a falling market, the evidence that remains would sufficiently establish plaintiff's authority, and the admissions sworn to would go far to make out a case for the plaintiff if such evidence be admissible in law.

The plaintiff, to make out his case, had to prove two contracts. 1st. The contract of agency by which he was commissioned to buy, and 2nd. The contract of purchase by which the first was carried into effect.

The first could be proved by verbal testimony, and may be assumed as established; the second, I conceive, required to be proved by a writing to give it legal effect.

It will therefore be assumed that an order was given, but the difficulty arises as to the proof of the execution of that order. The plaintiff as a broker could by a written contract, made out and evidenced by his own signature, bind two parties to a sale made by the one to the other through him, but when he attempts to bind one of the parties to himself, he requires, besides the verbal testimony as to his instructions, written evidence to establish the purchase, and this he cannot make for himself as against the party who instructed him to effect the purchase.

In the present case the purchase and resale are said to have been made at Chicago, and although spoken of by McLennan, junior, it is not from any personal knowledge possessed by him, but merely on the strength of telegrams received by his father from his correspondents, C. H. Taylor & Co., of

the costs incurred as well in the Court below as on the present appeal (the Hon. Mr. Justice Tessier dissenting).

Judgment of S. C. reversed.

Trenholme & Maclaren, for appellants.
Edward Carter, Q.C., for respondents.
(S.B.)

CIRCUIT COURT, 1880.

MONTREAL, FEBRUARY, 1880.

Coram TORRANCE, J.

No. 9946.

Johnson vs. *Longtin*.

HELD:—The placing a horse in charge of a person, to be pastured, is not a *dépôt* which can be proved by witnesses (when the sum or value involved exceeds $50). The oath of the defendant in such case, that he had received the horse but had subsequently delivered it back to the plaintiff, cannot be divided.

This was an action to recover from the defendant the value of a horse which had been placed in his charge to be pastured, and which he said he had given to one Decelles, an employee of the plaintiff, by authority of the latter. Decelles

The judgment now pronounced by this Court will be as follows:

Considering that the respondent, plaintiff in the Court below, hath failed to adduce in this cause any legal proof of the purchase by him of the 500 tierces of June lard mentioned in his declaration in this cause, or that the same was by him resold for or on account or at the risk of the appellant.

Considering, therefore, that there is error in the judgment rendered in this cause by the Superior Court at Montreal on the 30th March, 1878, the Court now here doth reverse the said judgment, and proceeding to give the judgment which the said Superior Court ought to have rendered, doth dismiss the said action of the respondent with costs, &c.

Judgment of S. C. reversed.

Davidson & Co., for appellant.
Macmaster & Co., for respondent.
(S.B.)

~~Cette assurance sur la vie est un bien meuble et, comme tel, est payable à l'exécuteur testamentaire, et non au légataire d'icelle.~~

PER CURIAM: M. Eusèbe Zéphirin Archambault est décédé à l'Assomption le 30 septembre 1879.

Par son testament, en date du 20 novembre 1876, M. Archambault a disposé de ses biens en faveur de ses frères, sœurs, neveux et nièces, par divers *legs particuliers*, faits à chacun d'eux; celui fait au mis en cause, frère du défunt, étant dans les termes suivants:

"4. Je donne et lègue en propriété, à Placide Archambault, un de mes frères, mon assurance sur ma vie, émanée de la Cie d'assurance "La "Citoyenne" de Montréal, se montant à $2000, avec tous les profits accrus et "à accroître jusqu'au jour et heure de mon décès."

Le testateur ajoute:

"Tous les legs particuliers, ci-dessus faits, et consistant en argent, à l'exception des parts de banque et assurance, *seront payés* à mes dit légataires "particuliers, *un an après mon décès*, sans intérêt."

Enfin il institue le demandeur, son neveu, son *légataire universel*; puis il le nomme son *exécuteur testamentaire*.

Le demandeur voyant que le testateur avait grevé sa succession d'un grand nombre de legs particuliers, et craignant que le résultat final de la liquidation de

salaire, et $18 en outre par année pour ses vêtements ; qu'en vertu de cette convention elle a travaillé chez son père depuis le 7 juillet 1863, jusqu'à sa mort arrivée en mai 1876, et que tout ce qu'elle a reçu de son père était pour le salaire qu'il lui devait, et qu'elle n'a rien reçu de lui en dépot.

Interrogée comme témoin, l'intimée a répondu qu'elle avait reçu $360 de son père, dont $42 provenaient de la succession d'un de ses frères et $318 pour salaire en vertu de la convention alléguée dans sa défense à l'action.

Il n'y a pas d'autre preuve au soutien de la demande que les réponses de l'intimée, et la Cour Inférieure en adjugeant que ces réponses ne pouvaient être divisées a renvoyé l'action des appelants.

Nous avons déjà jugé dans la cause de Fulton et McNamee, conformément à l'article 1243 du Code Civil, que l'aveu, soit judiciaire ou extra-judiciaire, ne peut être divisé contre celui qui le fait, et ce jugement a été confirmé par la Cour Suprême, (2 Suprême Court Rep. 470).

D'après cette décision et la jurisprudence invariable en matière d'aveux, le jugement de la Cour Inférieure doit être confirmé.

Il y a quelques cas spéciaux où les tribunaux sont justifiables de diviser l'aveu d'une partie, mais celui-ci n'en est pas un.

Judgment confirmed.

Doutre & Doutre, for appellants.
St. Pierre & Scallon, for respondents.
(J. K.)

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2. Que le demandeur est légataire universel du défunt, et qu'il a accepté la succession sous bénéfice d'inventaire, mais qu'il n'a jamais donné le cautionnement requis par la loi et demandé par les créanciers, en sorte qu'il ne peut réclamer le paiement des créances du défunt.

3. Que le testateur a légué la dite somme de $2000, due par la défenderesse, au mis en cause, à titre de legs particulier, que par suite le mis en cause est devenu saisi de la chose léguée, par le décès même du testateur, et que le demandeur ne peut la réclamer contre le gré du dit légataire.

Il conclut à être déclaré propriétaire de la somme consignée, et au renvoi de l'action du demandeur.

Trois questions sont donc soulevées par cette défense :

1. L'inventaire que le demandeur a fait faire des biens de la succession a-t-il été régulièrement fait en présence des parties intéressées ?

Il est admis que tous les procédés faits pour les premières vacations sont irréprochables ; c'est de ceux de la dernière vacation seule, celle du 12 janvier 1880, que le mis en cause se plaint, et ce simplement parceque, en l'absence d'un ajournement régulier de la vacation précédente, les intéressés avaient droit à un avis de convocation comme au premier jour dû qu'ils n'ont pas eu tel avis.

Or il appert par l'inventaire et par la preuve que la plupart des intéressés étaient présents à cette dernière vacation, le mis en cause lui-même y étant

branch at Montreal without objection. After such payment the respondents paid over part of the proceeds to the depositor. Six days afterwards the appellants discovered the fraud, and demanded back the amount of the forgery. The facts of the case are briefly as follows: The appellants, the Union Bank, at their head office in Quebec, issued on the 19th September, 1877, a draft for $25 on their branch office in Montreal, to a man calling himself Charles Deton. Deton, who was an entire stranger to the Union Bank, received this draft for $25, and altered or "raised" it so as to make it appear to be a draft for $5,000, and this alteration was so skillfully effected as to render detection very difficult, if not impossible. Deton had previously, on the 17th September, 1877, opened an account with the Ontario Bank at Montreal. This account was opened with him at respondent's bank, to whose officers he was an entire stranger, without any enquiries as to his character, without any introduction, and without the knowledge of the manager, by one of the bank clerks. On the 21st September Deton, by his office boy, deposited this draft, "raised" or altered to $5,000, in the Ontario Bank, and it was placed to his credit on that day, as of that amount. Respondents stamped it with the stamp of their Bank, showing it to be the Bank's property, and next day, 22nd September, 1877, presented it to appellants for payment, and this sum was at once paid without question to respondents by the appellant's manager. Deton drew out, by cheque, $3,500 from the Ontario Bank on the 22nd September, the same day that the appellants paid the draft in question, after which he absconded, and has not since been

L'exécuteur testamentaire a-t-il *la saisine* des biens de la succession à l'encontre même du légataire particulier, quant à ce qui fait l'objet de son legs ?

La question ne me paraît pas douteuse. Il suffit de mettre en regard les articles du Code qui règlent la saisine du légataire et celle de l'exécuteur testamentaire, pour en avoir la solution.

L'art. 891 dit :

"Le légataire à quelque titre que ce soit est, par le décès du testateur ou par "l'événement qui donne effet au legs, *saisi du droit à la chose léguée* dans "l'état où elle se trouve, et des accessoires nécessaires qui en forment partie, ou "du droit d'obtenir le paiement et d'exercer les actions qui résultent de son legs "*sans être obligé d'obtenir la délivrance légale.*"

L'art. 918 dit :

"L'exécuteur testamentaire est *saisi* comme *dépositaire légal*, pour les fins "de l'exécution du testament, des biens meubles de la succession *et peut en* "*revendiquer la possession même contre l'héritier ou le légataire.*"

.....

L'art. 919 :

"L'exécuteur testamentaire fait faire inventaire.....

"Il paie les dettes et *acquitte les legs particuliers*, du consentement de "l'héritier ou du légataire qui recueillent la succession, ou, lorsque appelés, avec "l'autorisation du tribunal."

and in the course of their transactions with the appellants, presented the draft for payment, and the appellants accepted and paid the same without demur, and thereby confirmed the respondents in the belief that the draft was genuine; and, after receiving the amount, the respondents paid over to Deton $3,485 thereof, leaving a balance of $1,515, which Deton had not received, and which they had tendered back to the appellants on being informed of the change which had been made in the draft, but without waiver of their rights in the premises; which tender they repeated in their plea. That appellants were by law bound to recognize their own drafts and to know the amount thereof, as they might easily have done by the exercise of ordinary care and diligence; and that, as they had accepted and paid the draft to the respondents, the latter were justified in paying over the amount thereof to the person from whom they had received the draft; and that the appellants cannot recover from the respondents any portion of the amount so paid over. By their conclusions the respondents prayed *acte* of the tender of the $1,515, and the dismissal of the action. They also filed a general denial of the allegations of the appellants' demand.

Upon these issues thus formed, the Union Bank proceeded to the adduction of proof, and in regard to the evidence there exists very little doubt, in fact, no controversy. It was established, and the judgment recognizes, that the draft was issued by appellants for $25, and was altered to $5,000. It is also established, beyond question, that respondents presented this draft, which bore the endorsation of Charles Deton, and the stamp of the Ontario Bank;

Aubry et Rau, t. 7 p. 435.
Nouv. Dem. vol. 8 p. 229.
Ricard, p. [illegible], Nos. 71 et 76.
Furgole, Test. chap. 10, sect. 4, Nos. 28, 29, 34 et 40.
Toullier, t. 5, Nos. 580, 589, 592 et 594.
Rousseau de Lacombe, vo. Ind. Test. No. 7.
Dalloz, No. 412, Test. vol. 9.
Dalloz, Rep. vol. 6, 129, Nos. 19, 20 et 22.

Il est vrai que, dans l'espèce, il n'y a pas, pour le moment, d'héritier ou de légataire universel, mais les circonstances de la cause démontrent que les légataires particuliers [illegible] peuvent être appelés à contribuer au paiement des dettes, au moyen [illegible] de leurs legs.

L'exécuteur testamentaire [illegible] donc failli à son devoir, s'il avait permis au mis en cause de prendre possession de son legs avant d'être sûr qu'il ne devra subir aucune réduction.

En principe donc, le demandeur a incontestablement droit à la somme en question, à l'encontre même du mis en cause; et les circonstances de la cause justifient amplement l'application du principe à l'espèce soumise.

Le jugement est comme suit:

taken the mistake could never have occurred. This is quite true, and no doubt it is a fact of some significance in the case. But it must, on the other hand, be borne in mind that the draft in question was for a very small amount, and it is also proved that at that time it was not the general custom among Banks to advise such drafts as the one given to Deton. Some indeed observed this precaution, but it was by no means a universal practice at that time. I believe it is so now. I cannot think, therefore, that in the present instance the omission can be regarded as an act of negligence, or even a want of due and proper diligence on the part of the Union Bank. I believe some of my colleagues are of the same opinion. There are some French authorities which sustain the respondents' view in this connection, but they do not apply to this case, and there is no English decision to justify such a pretention. 2. It is contended by the respondents that the appellants were bound in law to know the signature of their officers to the draft, but in the present instance they were equally held to know the contents in the body of the draft—in other words, to detect the forgery, by which the draft was "raised" from $25 to $5,000, and in the case under consideration the change was effected in such a way as to defy the most attentive and skillful scrutiny. This is conceded on all hands. I have no hesitation in expressing my belief that such a pretension as the above is unsustained by any principle of law or by any decision either in France, England or the United States. There may be such rulings in regard to bank bills in circulation, but the doctrine does not apply to promissory notes or to drafts, whether drawn on a branch bank, as in this

" considérant que par le décès du *de cujus*, le légataire particulier n'est, aux
" termes de l'article 891 du Code Civil saisi que du *droit à la chose légués* mais
" non de la possession et administration immédiate de cette chose, qui passe
" exclusivement à l'exécuteur testamentaire, dépositeur légal des biens meu-
" bles du testateur,

" Vû les articles 891, 918 et 919 du Code Civil,

" Considérant que la somme réclamée dans l'espèce est un bien meuble de la
" succession du dit feu Zéphirin Archambault, et que bien qu'elle ait été légués
" au mis en cause, le demandeur en qualité est bien fondé à en réclamer le
" paiement, même à l'encontre du dit mis en cause; pour par le dit demandeur
" l'employer ensuite conformément à l'intention et aux dispositions du dit testa-
" teur,

" Sans adjuger sur le droit du mis en cause à la propriété de la dite somme,
" renvoie l'exception par lui plaidée à l'encontre de l'action du demandeur, et
" condamne la défenderesse à payer au demandeur en qualité la somme réclamée
" par l'action."

Archambeault & Archambault, pour le demandeur.

Abbott, Tait, Wotherspoon & Abbott, pour la défenderesse.

Lacoste, Globensky & Bisaillon, pour le mis en cause.

(L. H. A.)

COURT OF REVIEW, 1880.

MONTREAL, 31st JANUARY, 1880.

Coram JOHNSON, J., RAINVILLE, J., JETTÉ, J.

No. 652.

Kelly vs. *The Hochelaga Mutual Fire Insurance Company.*

HELD:—1. That a mere threat to burn plaintiff's store, made during an election excitement and several months prior to the insurance being effected, was not such a threat, the omission to disclose which at the time of effecting the insurance would amount to a concealment of a material fact.

2. That the acceptance by the defendant of the preliminary proofs of loss, after the expiration of the delay required by one of the conditions of defendant's policies, and the statement by the defendant that the Company refused to acknowledge any claim on account of the undisclosed threat of incendiarism, amounted to a legal waiver of the condition.

The action was brought in the Superior Court here, to recover $2,000 for loss by fire under an interim agreement to insure the stock in trade of the plaintiff, of date the 4th of June, 1877.

The store and all its contents, including the plaintiff's books of account and papers, were totally destroyed by a fire which occurred on the 17th of June, 1877.

The agreement to insure is admitted by the defendant's pleas, but, by the first plea, it is contended that the insurance was (by such agreement) declared to be subject to all the conditions and regulations contained in or endorsed upon the printed form of policy then in use by the Company. That by one of such conditions any misrepresentation of or omission to communicate any circumstance which is material to be made known to the Company, the insurance should be of no effect. That long previous to said 4th day of June, 1877, the plaintiff had been notified and warned that the store in which said stock in trade was contained was to be set on fire and burnt by a personal enemy. That the fire was the act of an incendiary and the result of said threat. That the plaintiff wholly, wrongfully and illegally concealed said threat from defendant, which, if communicated, would have caused the defendant to absolutely refuse said insurance. And that in consequence said insurance became and was wholly null and void.

By its second plea, the Company contended that the plaintiff had wholly failed, as required by the conditions of such form of policy, to furnish proofs of plaintiff's loss satisfactory to the directors of the Company, on the printed forms in use by the Company, within 30 days from the occurrence of the fire, and that no loss, consequently, ever became payable by said defendant.

The defendant also pleaded the general issue.

The plaintiff, by his special answer to the first plea, alleged "that the only information he ever received as to any threatened intention of any one to burn the shop in the plaintiff's declaration mentioned was given to him by one Captain Smith, in the month of February, 1877, and during a time of excitement consequent on the municipal election, at which the said plaintiff was a candidate, and which had then recently taken place. That the character of this intima-

tion was simply that parties (whose names were not even mentioned), had threatened to burn the plaintiff's said shop. That the said plaintiff paid little or no attention to the said intimation at the time, and as the excitement died out, and no such threat was ever afterwards repeated, the said plaintiff ceased to give the matter any further attention, and the subject thereof had wholly escaped his recollection until after the occurrence of the fire in the said declaration referred to, when the fact of the fire, and the suspicion the plaintiff entertained that the fire was the work of an incendiary, served to remind him of the incident. That the effecting of the said insurance by plaintiff, moreover, was in no way caused by what the plaintiff had been so told by said Captain Smith, the said plaintiff having been prompted to effect said insurance solely because of his ceasing to reside in New Carlisle where the shop was, and being thus deprived of watching over and protecting the store from the danger of fire as he had hitherto done."

The plaintiff specially replied to the second plea as follows:—

That the said plaintiff was wholly ignorant of the necessity of furnishing proofs of loss on the printed forms in use by the said Company, defendant, and, after furnishing to the said Company, defendant, such proofs of his loss by the fire in the plaintiff's declaration referred to as the nature of the case would admit of, before the expiration of the month of June last, the said Company, defendant, received the same without raising any objection that the same were not furnished on such printed forms until the 24th day of August last, when the said Company, by the letter herewith fyled as the plaintiff's exhibit number 3, for the first time required of the said plaintiff to make out his claim of loss on one of such printed forms, which the said Company enclosed in said letter for that purpose.

That, moreover, until such printed form was so furnished by said Company to the plaintiff it was completely out of his power to make proof of his loss in that form, he not being in possession of any such form and none such having been previously offered or tendered to him by said Company or its agents.

That immediately on the receipt of said letter, the said plaintiff caused the said form so furnished by said Company to be filled up and completed in all respects according to its requirements, and forwarded the same without delay to the said Company, defendant, which duly received the same.

That even after the receipt by the said Company of the said form so filled up and completed, the said Company, by another letter, of date the 27th day of September last (herewith produced and fyled as the plaintiff's exhibit No. 4), required further information regarding the said fire and loss, and a further certificate by a magistrate in the neighbourhood of the fire, and to that end enclosed an additional form which the said plaintiff caused to be filled up and completed as required by said Company, and the said plaintiff did also furnish all the information required by said last mentioned letter which was within his knowledge, control or power. And he, the said plaintiff, hath in all respects conformed to the demands and requirements of said Company regarding said fire and loss to the best of his power and ability.

And the said plaintiff saith, that in all that the said Company, defendant,

Kelly vs. The Hochelaga Mutual Fire Insurance Co.

hath done since the said fire the said Company waived any right which it might strictly have had to be furnished with said proofs of loss within any specified period, and hath on various occasions and in various ways waived the strict compliance with the conditions of its printed forms of policy."

On the 18th of October, 1879, the Superior Court (TORRANCE, J.) gave judgment for the plaintiff, remarking as follows: "As to the non-compliance with the requirements of the policy, I think there was waiver so far as the delay of 30 days was concerned, within which the proof had to be made. The real point in the case is whether there was concealment of a material fact on the 6th June, when the insurance was effected, and when the plaintiff omitted to say that in the month of February, four months before, he was informed that the people there threatened that if the people of Paspebiac came up there to beat the people, they, the people of New Carlisle, would burn his (Mr. Kelly's) store and hang him. The people of Paspebiac did not come up, and nothing happened. The fire on the 17th June was supposed to be the act of an incendiary, but in nowise connected with the election of February. Under these circumstances, was it material to mention the threat in February, in making the insurance in June? I must here judge the fact as if I were a juryman, and I hold that it was not a material fact. The pleas are therefore overruled and judgment given for plaintiff."

The defendant inscribed in Review, and, at the argument, *Monk* (for defendant) cited May on Ins. § 208, pp. 218 and 222; Bunyon on Fire Ins., p. 59; Curry vs. The Commonwealth Ins. Co., 10 Pickering's R. 525, in support of the proposition that there had been concealment of a material fact. And *Bethune*, Q.C. (for plaintiff), cited against the proposition May on Ins. § 209, p. 220, and, in support of the question of waiver, Dill vs. The Quebec Fire Ins. Co., 1 Rev. de Leg. 113; Pine vs. Reid, 6th Man. & Gr. 1, and specially the ruling of Ch. J. Tindal at p. 10; Goodwin and The Lancashire Fire Ins. Co., 18 L. C. J. 1; Angell on Fire Ins. § 242 and 248; Clarke, Fire Ins., 235-236-237.

JOHNSON, J. In this cause the action was brought to recover $2,000 for a loss by fire under an interim agreement to insure the stock in trade of the plaintiff, and the defendants pleaded, admitting the contract, but alleging it to have been made subject to the conditions of the Company's policies, one of which was that there was to be no recourse if there was any misrepresentation, or omission to communicate any circumstance material to be made known to the insurer; and that, previous to the contract, the plaintiff had been warned that the store was to be set on fire by an enemy, and that the fire was, in fact, the result of the threat or warning; and the plaintiff concealed the fact from the Company, which, if it had been known to them, would have prevented them from insuring. There was a second plea under which the Company contended that the plaintiff had failed to furnish proof of his loss to the satisfaction of the Company on the printed forms in use, and in conformity with another condition of the policy, within 30 days from the occurrence of the fire. The plaintiff made special answers to both of these pleas. To the first he said that during the excitement of a municipal election, at which he was a candidate, he had been

informed that somebody had threatened to burn his store, but no name was mentioned, and he thought the threat was of such a character that he paid no attention to it at the time, and only remembered it after the fire, when the suspicion he had that the thing had really been the act of an incendiary made him recall it. To the second plea of the defendants, as to the notice of loss, the plaintiff replied that he was wholly ignorant of the stipulation as to the notice being required to be given on the printed forms of the Company; that he gave such proofs as the nature of the case admitted of, the fire having occurred at New Carlisle, and all his books and papers having been destroyed; that the Company received all the information he had to give without raising any objection on that score; and in fact the notice and claim were made afterwards (on the 24th August) on a printed form furnished by the Company, and which he immediately used for the purpose. That even after this information had been furnished in the form requested (it having been impossible for him to use this form before he got one), the Company asked for and got further information, which they asked for by a subsequent letter of the 27th of September. There are, therefore, two points to be considered: first, whether there was a material concealment, and, secondly, whether the thirty days rule had been complied with to the extent of the plaintiff's power, and with the consent of the Company, which would thus have waived the condition. We are unanimously for the plaintiff on both points. With respect to the proof of these special answers, it is complete on all points. The so-called threat was apparently one of those senseless things that reckless men say at times of excitement to show their fitness for free institutions. No one attached any importance to it; and, such as it was, it referred to that very night, which not only passed away without harm, but the application for insurance itself was only made four months afterwards.

As to the second point, it seems to have been virtually abandoned by the Company itself.

The evidence of Alexander Taylor shows that the agent of the Company, when certain invoices were produced which the Company had called for, stated that he had all that was required to lay before the Board, and the claim was resisted solely on the ground of the non-disclosure of the threat. The doctrine with respect to furnishing proofs within a stipulated time was enforced in the case of Whyte v. The Western Assurance Company. That doctrine never extended to saying there could be no waiver; but merely applied the stipulation where there was nothing to modify it. We therefore confirm the judgment which was given for the plaintiff.

Judgment of S. C. confirmed.

Bethune & Bethune, for plaintiff.
Davidson & Monk, for defendant.
(S.B.)

COUR SUPERIEURE, 1880.

MONTREAL, 13 NOVEMBRE 1880.

Coram RAINVILLE, J.

No. 390.

Vaillancourt vs. *Collette*, et *Perrault*, tiers-opposant, et *J. A. Ouimet* et al., procureurs distrayants, et *P. Beaubien*, créancier colloqué, et *G. A. Nantel*, contestant.

JUGE: 1o. Que les frais faits pour obtenir le renvoi d'une tierce-opposition ayant pour objet d'empêcher la vente d'un immeuble par le shérif, sont des frais sur les incidents de la saisie et nécessaires pour arriver à la vente de l'immeuble, et comme tels doivent prendre rang par privilége comme frais de justice (C. P. C. art. 728, Par. 6.)

2o. Que ces mêmes frais sont faits dans l'intérêt commun des créanciers suivant l'art. 2009 C. C., Par. 6.

PER CURIAM.—Les faits de cette cause sont bien simples.

Le demandeur, Vaillancourt, était créancier hypothécaire d'un homme nommé Bellefleur. Ce dernier vendit sa propriété au défendeur. Après cette vente, Bellefleur tomba en faillite, et son syndic M. Perrault, prit contre Collette une action révocatoire pour faire annuler cette vente comme ayant été consentie en fraude de ses créanciers.

Cette action demeura en suspens pendant assez longtemps, et durant cette intervalle, Vaillancourt prit une action hypothécaire contre le tiers-détenteur Collette, et obtint jugement. Collette délaissa, et un curateur au délaissement fut nommé.

Vaillancourt fit ensuite saisir la propriété délaissée. C'est alors que le syndic de Bellefleur produisit une tierce-opposition réitérant contre Collette les allégations de son action révocatoire, et demandant effectivement que les deux causes fussent jointes (et il en avait le droit, car elles étaient connexes), et attaquant la saisie et le jugement de Vaillancourt en autant que la créance était éteinte. La vente fut en conséquence arrêtée.

La Cour de Révision, par son jugement de mai 1880, a maintenu la tierce-opposition de Perrault en autant qu'elle avait trait à la demande révocatoire portée contre Collette, et l'a renvoyée en tant qu'elle concernait Vaillancourt, avec dépens contre Perrault en faveur de Vaillancourt ou plutôt de ses procureurs.

L'obstacle qui s'était opposé à la vente de la propriété saisie ayant été levé, cette vente eut lieu, et les deniers sont maintenant rapportés pour distribution.

Le rapport de distribution est préparé et M. Nantel, comme cessionnaire de MM. Ouimet, Ouimet et Nantel, les avocats distrayants, n'ayant pas été colloqué des frais encourus sur la tierce-opposition tant en cour de 1ère instance qu'en Cour de Révision, conteste cet ordre de distribution et demande à être colloqué par privilége, du montant de ces frais.

Toute la question soulevée par la contestation de la collocation de M. Pierre Beaubien, créancier colloqué, par privilége de vendeur, est de savoir si les frais encourus par Vaillancourt pour faire renvoyer la tierce opposition de Perrault sont privilégiés.

Je n'attache aucune importance à l'objection faite par les avocats de M. Beaubien, que ces frais sont aujourd'hui réclamés par M. Nantel, tandis que

les avocats du dossier qui ont obtenu distraction sont MM. Ouimet, Ouimet et Nantel et qu'il n'y a jamais eu de signification de transport.

Il est prouvé que cette société est dissoute et que les frais sont échus en partage à M. Nantel. MM. Ouimet ont produit un consentement à cet effet dans la cause. Or il a été décidé et avec raison, je crois, par M. le juge H. E. Taschereau, que l'article 1571 de notre code, qui exige la signification d'un transport pour saisir le cessionnaire d'une créance ou d'un droit, ne s'appliquait pas au partage de la masse d'une société.

1 Legal News p. 52, Tate vs. Torrance.

Ces frais sont-ils privilégiés ? Voilà la question. Non, dit le créancier colloqué, car ils n'ont pas été faits dans l'intérêt commun, et il cite l'art. 2009, §1 de notre code et quelques commentateurs du C. N., art. 2101 qui est sur ce point identique au nôtre.

Mais ces commentateurs, et entre autres Troplong au No. 123, priv. et hyp. (No. suivant celui que l'on m'a cité) divise les frais en *ordinaires* et *extraordinaires*. Ces *extraordinaires* sont ceux, dit-il, qui sont occasionnés par les oppositions du saisi ou par d'autres événements qui paralysent la marche de la procédure. Et d'après le système du Code de Pr. français, (art. 714) ces frais extraordinaires ne sont payés par privilége que lorsqu'il en a été ainsi ordonné par un jugement : lorsque le juge, dit Troplong, a pris connaissance de la justice de la réclamation qui y donne lieu. (Nouv. Pigeau 2, p. 154, 182 et 267). Mais rien de tel dans notre droit, et l'art. 728 de notre Code de Procédure a défini ce qu'on doit entendre par frais de justice, et ils sont colloqués dans l'ordre suivant :

1o. Frais de l'ordre ; 2o.....; 3o. frais encourus sur le bref d'exécution contre les immeubles et ce qui peut rester dû sur la discussion des meubles ; 4o. ..... ; 5o..... ; 6o. *Les frais sur les incidents de la saisie, et nécessaires pour arriver à la vente des immeubles tant en première instance qu'en appel.* Et nos codificateurs citent Pothier, Pigeau, Héricourt, etc,

Voyons ce que dit Pothier : " Les frais *extraordinaires* sont ceux que le poursuivant a été obligé de faire sur les incidents survenus pendant le cours de la saisie réelle ; par exemple les frais sur un appel de la saisie réelle, sur les *oppositions*.....

" Le poursuivant, en faisant ces frais, a géré l'affaire commune de tous les créanciers.

" Il les a faits dans l'intérêt commun de tous les créanciers qui avaient tous intérêt que la saisie fut mise à chef, pour pouvoir être payés de leur créance, et ces frais étaient nécessaires pour l'y mettre ; il est donc juste que celui qui les a faits en soit remboursé par préférence.

" On ne doit pas même obliger le poursuivant à se pourvoir *contre ceux qui ont fait les incidents*, et qui *ont été condamnés aux dépens envers lui:* il est seulement tenu de céder, à cet égard, ses actions aux créanciers sur lesquels l'ordre manquera, pour, par eux, *les exercer en sa place ainsi qu'ils pourront.*"

Ce dernier passage de Pothier répond à l'objection du créancier Beaubien que le contestant, M. Nantel, n'avait pas établi qu'il n'avait pas été payé par Perfault ni qu'il eut fait des procédures pour se faire payer.

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" Et, dit Pothier, ces frais extraordinaires se paient après les droits de consignation lesquels sont payés avant même les frais de justice." (C'est ce qui a encore lieu dans notre pays.)

Poth. Proc. civ., No. 644 à 647.

" Les frais extraordinaires, dit Pigeau, forment le premier privilége sur le produit de la vente des immeubles ; ces frais sont tous ceux qui sont légitimement faits à raison des *incidents qui sont survenus pendant la poursuite* : 1o. pour faire *prononcer la main levée d'une opposition afin d'annuler, de distraire* ou de charge : sans ces frais on n'aurait pas pu faire lever l'obstacle à la vente." 1 Pigeau, p. 810.

Héricourt—Vente des immeubles par décret, p. 205, énonce la même opinion, et il ajoute : " On comprend encore dans les frais *extraordinaires* des décrets, " ceux qui ont été faits par le poursuivant, contre les parties qui ont été débou- " tées de leur *opposition ou de quelqu'autre demande*, et condamnées aux " dépens. Car, quoique le poursuivant puisse agir contre ces parties pour se " faire rembourser, on a cru ne pas pouvoir l'engager à faire de nouvelles pro- " cédures, après toutes les avances qu'il avait été obligé de faire pour les décrets, " ni l'exposer à perdre ses frais, si ceux contre lesquels il a été obligé de les " faire pour le bien des créanciers se trouvent insolvables. On réserve aux cré- " anciers qui ne se trouvent point utilement colloqués, à faire des poursuites " contre les parties qui ont succombé pour se faire payer des dépens."

" Et le poursuivant a un privilége pour ces frais extraordinaires, quand " même il serait des *derniers créanciers*." C'est d'après ces principes que les tribunaux en France décident, sous l'opération de l'art. 714 du Code de Procédure, quels sont les frais *extraordinaires* qui seront payés par privilége.

Voir Carré Q. 2399, sur l'art. 714.

" Les frais *extraordinaires* doivent être déclarés privilégiés, dit Carré, lorsque la partie saisie les a occasionnés et qu'elle a succombé."

Voir Lepage, Traite des Saisies, T. 2, p. 102.

Dans la cause actuelle n'est-ce pas le débiteur principal, par son syndic, qui a mis un obstacle à la vente de l'immeuble saisi ? Et en faisant renvoyer la tierce-opposition, le demandeur Vaillancourt n'a-t-il pas agi dans l'intérêt commun en faisant écarter l'obstacle qui s'opposait à la vente ?

Si le créancier Beaubien eut été le poursuivant, au lieu de Vaillancourt, et que le syndic de Bellefleur eut voulu lui faire une mauvaise contestation, comme celle qu'il a faite à Vaillancourt, en alléguant que sa créance était payée ou éteinte, est-ce que M. Beaubien n'aurait pas été obligé de faire les mêmes frais que Vaillancourt ? Et prétendrait-il alors que ces frais n'auraient pas été faits dans l'intérêt commun ?

Je suis à me demander où serait la différence et je ne la trouve pas.

Je suis donc d'opinion que les frais encourus par Vaillancourt pour faire renvoyer la tierce-opposition de Perrault sont des frais de justice, et doivent être colloqués comme tels d'après leur rang suivant l'art. 728 du C. de P.

La contestation doit donc être maintenue.

De Bellefeuille & Bonin pour le créancier colloqué.

Champagne & Nantel pour le contestant, et *J. Ald. Ouimet, C. R.*, Conseil.

(G. A. N.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 20TH DECEMBER, 1879.

Coram Hon. SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 116.

TRENHOLME, APPELLANT;

AND

McLENNAN, RESPONDENT.

HELD:—That a broker's authority, by his own writing and signature, and by the delivery of bought and sold notes, to bind as between themselves the purchaser and seller making a transaction through him, has no application to, and cannot dispense him with the necessity of making proof by writing when he himself seeks to recover damages, against his own customer, in respect of an alleged purchase and re-sale for and on account of the party from whom he has received an order to purchase. In such case he has two things to prove: First, his own authority to make the transaction: and, secondly, a purchase and re-sale. The first may be proved by verbal testimony, but the second, under Art. 1235 C.C., in order to bind the party towards himself, requires a writing when the sum or value involved exceeds $50.

CROSS, J. In this action McLennan, a broker, sued Trenholme for $695.62, the alleged amount of loss on a purchase and resale of 500 tierces of June lard, made at Chicago in April, 1876, as the plaintiff pretends, on an order given him by Trenholme to make the purchase, who afterwards refused to accept and pay for the article which he, McLennan, was consequently obliged to resell, and did so at a loss which with his commission amounted to the sum claimed.

Trenholme by his plea specially negatived each of plaintiff's allegations of fact; he besides pleaded the general issue.

The Superior Court, on the 30th March, 1878, gave judgment for the plaintiff, which judgment is now questioned by the present appeal.

In proof, no writing was produced from Trenholme to authorize the purchase, nor any bought or sold notes to evidence the transactions of purchase and resale.

Trenholme, examined as plaintiff's witness, says that on the 20th April he gave McLennan an order to buy, but not to buy on a falling market. He called the next day, when McLennan told him he had not purchased; he supposed the thing was at an end at that time.

In another part of his evidence he says that when he was next in McLennan's office, he made objections, and told him that he had purchased contrary to his, Trenholme's, orders completely.

On being asked whether it was in purchasing on a falling market that McLennan had disobeyed instructions, he answers: "Not only that, but he purchased at a time after he had no right to do it. I gave him the next day to do it in, and called, and it was not done; I went home and supposed it was at an end."

McLennan's son, a clerk in his office, being examined, cannot state from his personal knowledge the giving of instructions by Trenholme to his father, but says that, being himself in an outer room, Trenholme on leaving his father's

Trenholme and McLennan.

office and passing out by him, on the 24th April, turned back and said: "be sure to get it at thirteen thirty," which he interpreted as having reference to instructions Trenholme must then have been giving to McLennan to buy the lard. He also states that Trenholme was at his father's office on the 26th, the day of the purchase, and after it was made, and on being asked, "Did you hear any conversation that took place between your father and him?" he answers, "He appeared satisfied with the purchase from his conversation."

He saw Trenholme afterward, on the 27th, at his farm, where he carried and delivered to him a note asking him for a margin of $1,000, when he, Trenholme, said he would be in town next day and get the money for my father; but he did not come. The lard had then been resold but he did not inform Trenholme, wishing first to secure the margin of $1,000. He also says he saw him again at the same place on the 6th of May, and delivered him a note demanding the amount of the loss, when Trenholme said he would be in on Monday, the 8th May, and arrange the payment of the loss.

An objection was made to this evidence on the ground of its illegality, and as tending to establish by parole testimony an alleged purchase or sale exceeding the amount permitted by the Code.

This testimony is quite contradictory of Trenholme's, but would be explicable, and accord with it save as to the acknowledgment, which would go to establish the plaintiff's case if the evidence be legal, the defendant's testimony in law making nothing in his favor.

McLennan's testimony conveys the impression that Trenholme did give the order for the purchase, and rejecting Trenholme's statements as to limitation of time within which the order was to be executed, and the restriction of not buying in a falling market, the evidence that remains would sufficiently establish plaintiff's authority, and the admissions sworn to would go far to make out a case for the plaintiff if such evidence be admissible in law.

The plaintiff, to make out his case, had to prove two contracts. 1st. The contract of agency by which he was commissioned to buy, and 2nd. The contract of purchase by which the first was carried into effect.

The first could be proved by verbal testimony, and may be assumed as established; the second, I conceive, required to be proved by a writing to give it legal effect.

It will therefore be assumed that an order was given, but the difficulty arises as to the proof of the execution of that order. The plaintiff as a broker could by a written contract, made out and evidenced by his own signature, bind two parties to a sale made by the one to the other through him, but when he attempts to bind one of the parties to himself, he requires, besides the verbal testimony as to his instructions, written evidence to establish the purchase, and this he cannot make for himself as against the party who instructed him to effect the purchase.

In the present case the purchase and resale are said to have been made at Chicago, and although spoken of by McLennan, junior, it is not from any personal knowledge possessed by him, but merely on the strength of telegrams received by his father from his correspondents, C. H. Taylor & Co., of

Chicago. Nobody was examined from Chicago or elsewhere to speak from a personal knowledge of the purchase and resale. The telegrams are a very weak kind of hearsay evidence; there is nothing else. There is consequently an entire failure to prove the facts most material to sustain the action.

Art. 1233 of the Civil Code gives generally the cases in which proof may be made by testimony.

Proof may be so made, § 1, of all facts concerning commercial matters.

Art. 1235 coming afterwards, qualifies the general provision regarding proof in commercial matters as follows:

"In commercial matters in which the sum of money or value in question exceeds $50, no action or exception can be maintained against any party or his representatives unless there is a writing by the former in the following cases:

§ 4. Upon any contract for the sale of goods unless the buyer has accepted or received part of the goods, or given something in earnest to bind the bargain."

It seems clear in this case that there was a necessity to make a legal proof of the purchase of the 500 tierces of lard to enable the plaintiff to sustain his action; that such proof should have been made by a writing; that the plaintiff's failure to make such proof was fatal to his recourse, and his action must fail. Were it otherwise, an enormous power would be placed in the hands of a broker, and a great temptation to abuse it. The plaintiff may have had grounds of complaint, but, without a legal and sufficient proof, the Court ought not to grant his conclusions.

The judgment now pronounced by this Court will be as follows:

Considering that the respondent, plaintiff in the Court below, hath failed to adduce in this cause any legal proof of the purchase by him of the 500 tierces of June lard mentioned in his declaration in this cause, or that the same was by him resold for or on account or at the risk of the appellant.

Considering, therefore, that there is error in the judgment rendered in this cause by the Superior Court at Montreal on the 30th March, 1878, the Court now here doth reverse the said judgment, and proceeding to give the judgment which the said Superior Court ought to have rendered, doth dismiss the said action of the respondent with costs, &c.

Judgment of S. C. reversed.

Davidson & Co., for appellant.
Macmaster & Co., for respondent.
(S.B.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 3RD FEBRUARY, 1880.

SIR A. A. DORION, C.J., MONK, RAMSAY, TESSIER, CROSS, JJ.

No. 165.

FRANÇOIS SAUVÉ ET AL.,
(Plaintiffs in Court below,)
APPELLANTS;

AND

SOLOMON DENIS dit VERONNEAU ET UX.,
(Defendants in Court below,)
RESPONDENTS.

HELD:—An admission, whether judicial or extra-judicial, cannot be divided, so as to make proof by a part thereof against the party making such admission.

SIR A. A. DORION, C.J.—Les appelants, exécuteurs testamentaires de leur père, feu François Sauvé, réclament des intimés une somme de $512.48, se composant de celle de $370 que François Sauvé aurait confié à l'intimée, sa fille, vers le 1er janvier 1872, pour la mettre en dépot à la Banque d'Epargnes à Montréal, et qu'elle aurait déposée en son nom et de $142.48 pour intérêts qu'elle aurait perçus sur cette somme de $370.

Les défendeurs ont répondu à cette demande que tout ce que l'intimée avait reçu de son père, lui avait été payé pour salaire; qu'en juillet 1863, sur le refus de son père, elle aurait refusé de contracter mariage, et que pour l'induire à demeurer avec lui, il lui aurait promis de lui payer $3 par mois, à titre de salaire, et $18 en outre par année pour ses vêtements; qu'en vertu de cette convention elle a travaillé chez son père depuis le 7 juillet 1863, jusqu'à sa mort arrivée en mai 1876, et que tout ce qu'elle a reçu de son père était pour le salaire qu'il lui devait, et qu'elle n'a rien reçu de lui en dépot.

Interrogée comme témoin, l'intimée a répondu qu'elle avait reçu $360 de son père, dont $42 provenaient de la succession d'un de ses frères et $318 pour salaire en vertu de la convention alléguée dans sa défense à l'action.

Il n'y a pas d'autre preuve au soutien de la demande que les réponses de l'intimée, et la Cour Inférieure en adjugeant que ces réponses ne pouvaient être divisées a renvoyé l'action des appelants.

Nous avons déjà jugé dans la cause de Fulton et McNamee, conformément à l'article 1243 du Code Civil, que l'aveu, soit judiciaire ou extra-judiciaire, ne peut être divisé contre celui qui le fait, et ce jugement a été confirmé par la Cour Suprême, (2 Supréme Court Rep. 470).

D'après cette décision et la jurisprudence invariable en matière d'aveux, le jugement de la Cour Inférieure doit être confirmé.

Il y a quelques cas spéciaux où les tribunaux sont justifiables de diviser l'aveu d'une partie, mais celui-ci n'en est pas un.

Judgment confirmed.

Doutre & Doutre, for appellants.
St. Pierre & Scallon, for respondents.

(J. K.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 24TH NOVEMBER, 1880.

Coram The Hon. Sir A. A. Dorion, Ch. J., Monk, J., Ramsay, J., Cross, J., Baby, J.

No. 23.

THE UNION BANK OF LOWER CANADA,

APPELLANT;

AND

THE ONTARIO BANK,

RESPONDENT:

HELD:—That where a Bank draws a draft for $25 on one of its branches, and fails to advise such branch of the fact, and the draft is afterwards raised to one for $5000, and so skillfully as to deceive the branch office, which pays the amount of the draft as raised to another Bank, holding the draft in good faith, and, in consequence of such payment, this latter Bank pays $3500 on account thereof to the person from whom the Bank received it, the former Bank cannot recover from the latter Bank the amount so paid to it.

This was an appeal from the judgment of the Superior Court at Montreal, reported in the 23d L. C. J., p. 66.

Monk, J., *dissentiens*:—In this case the appellants, the Union Bank, Quebec, drew a draft upon their branch at Montreal for $25, without advice to branch of the fact. The holder altered the amount of the draft to $5,000, and deposited it to his own credit in his banking account with respondents, the Bank of Ontario. Respondents presented it in due course, and it was paid by the branch at Montreal without objection. After such payment the respondents paid over part of the proceeds to the depositor. Six days afterwards the appellants discovered the fraud, and demanded back the amount of the forgery. The facts of the case are briefly as follows: The appellants, the Union Bank, at their head office in Quebec, issued on the 19th September, 1877, a draft for $25 on their branch office in Montreal, to a man calling himself Charles Deton. Deton, who was an entire stranger to the Union Bank, received this draft for $25, and altered or "raised" it so as to make it appear to be a draft for $5,000, and this alteration was so skillfully effected as to render detection very difficult, if not impossible. Deton had previously, on the 17th September, 1877, opened an account with the Ontario Bank at Montreal. This account was opened with him at respondent's bank, to whose officers he was an entire stranger, without any enquiries as to his character, without any introduction, and without the knowledge of the manager, by one of the bank clerks. On the 21st September Deton, by his office boy, deposited this draft, "raised" or altered to $5,000, in the Ontario Bank, and it was placed to his credit on that day, as of that amount. Respondents stamped it with the stamp of their Bank, showing it to be the Bank's property, and next day, 22nd September, 1877, presented it to appellants for payment, and this sum was at once paid without question to respondents by the appellant's manager. Deton drew out, by cheque, $3,500 from the Ontario Bank on the 22nd September, the same day that the appellants paid the draft in question, after which he absconded, and has not since been

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heard of. Appellants brought their action against respondents in the Court below to recover the sum of $4,975, being the amount by which the $5,000 paid by them exceeds the draft of $25 really issued to Deton; and in their declaration they allege that the defendants, representing the draft to be genuine, presented the fraudulently altered draft to appellants for payment, and obtained payment without giving any consideration or value therefor.

In the consideration of this case it is evident at the outset that the appellants are in the position of parties who have paid by error what they did not owe; and contend that they have a clear right to recover it back, unless the respondents can show that this case is an exception to the general rule, that what is paid without cause can be recovered back. C. C., art. 1047. To this demand respondents pleaded: That they were ignorant whether the draft in question was originally issued to said Deton for $25 only; but that when the draft was placed in their hands for collection, it purported and appeared to be, and had in all respects, the genuine and *bona fide* appearance of a draft for $5,000; and, as in appellants' declaration set forth, the alteration, if ever made, had been so skillfully done as to render it impossible to be detected. That Deton was not a regular customer of the respondents, having only opened a deposit account with them a short time previous to depositing with them the draft in question. That on the 22nd September, 1877, Deton had brought the respondents the draft in question, and requested them to receive it on deposit, which they agreed to do; but notified him that they would not allow him to draw, nor would they accept his cheques, against the amount thereof, until the same had been accepted and paid by the appellants. That thereupon respondents in good faith, and in the course of their transactions with the appellants, presented the draft for payment, and the appellants accepted and paid the same without demur, and thereby confirmed the respondents in the belief that the draft was genuine; and, after receiving the amount, the respondents paid over to Deton $3,485 thereof, leaving a balance of $1,515, which Deton had not received, and which they had tendered back to the appellants on being informed of the change which had been made in the draft, but without waiver of their rights in the premises; which tender they repeated in their plea. That appellants were by law bound to recognize their own drafts and to know the amount thereof, as they might easily have done by the exercise of ordinary care and diligence; and that, as they had accepted and paid the draft to the respondents, the latter were justified in paying over the amount thereof to the person from whom they had received the draft; and that the appellants cannot recover from the respondents any portion of the amount so paid over. By their conclusions the respondents prayed *acte* of the tender of the $1,515, and the dismissal of the action. They also filed a general denial of the allegations of the appellants' demand.

Upon these issues thus formed, the Union Bank proceeded to the adduction of proof, and in regard to the evidence there exists very little doubt, in fact, no controversy. It was established, and the judgment recognizes, that the draft was issued by appellants for $25, and was altered to $5,000. It is also established, beyond question, that respondents presented this draft, which bore the endorsation of Charles Deton, and the stamp of the Ontario Bank,

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to the appellants' office in Montreal, and were paid the amount. There was nothing to indicate to appellants that respondents were not complete owners of this draft, of which they were holders. The question to be decided is whether the Ontario Bank is bound to repay the amount paid on the forged draft. The Court below decided this question in the negative, and from that decision the present appeal is taken. At the very outset it is proper to note that both the Banks acted in this matter, with perfect good faith. Nothing in the evidence or in the circumstances of the case, discloses any attempt at surprise, or any want of candor or of the most scrupulous integrity and fair dealing on the part of either of the Banks. It may be urged that there was a want of diligence, perhaps there may have been a certain amount of caution on the part of the respondents, but no shadow of unfairness or insidious device can rest on any of the incidents which led to the institution of the present action. The suit is to recover the sum of $4,975 paid by the Union Bank to the Bank of Ontario in error on a forged draft, and the latter institution resists their claim, contending that if the money was paid by error, it was through the negligence or want of proper diligence on the part of the Union Bank. Such, in plain terms, are the issues between the parties, and in view of the facts it must be conceded that the decision of the case is not without difficulty. Before, however, proceeding to consider the law and the proof in their bearings and application, it may not be amiss to advert briefly to two points of importance in considering the contention raised between the appellants and respondents. It is urged by the latter that the head office at Quebec did not advise the Branch at Montreal of the issue of the draft in favor of Deton for $25. Had this precaution been taken the mistake could never have occurred. This is quite true, and no doubt it is a fact of some significance in the case. But it must, on the other hand, be borne in mind that the draft in question was for a very small amount, and it is also proved that at that time it was not the general custom among Banks to advise such drafts as the one given to Deton. Some indeed observed this precaution, but it was by no means a universal practice at that time. I believe it is so now. I cannot think, therefore, that in the present instance the omission can be regarded as an act of negligence, or even a want of due and proper diligence on the part of the Union Bank. I believe some of my colleagues are of the same opinion. There are some French authorities which sustain the respondents' view in this connection, but they do not apply to this case, and there is no English decision to justify such a pretention. 2. It is contended by the respondents that the appellants were bound in law to know the signature of their officers to the draft, but in the present instance they were equally held to know the contents in the body of the draft—in other words, to detect the forgery, by which the draft was "raised" from $25 to $5,000, and in the case under consideration the change was effected in such a way as to defy the most attentive and skillful scrutiny. This is conceded on all hands. I have no hesitation in expressing my belief that such a pretension as the above is unsustained by any principle of law or by any decision either in France, England or the United States. There may be such rulings in regard to bank bills in circulation, but the doctrine does not apply to promissory notes or to drafts, whether drawn on a branch bank, as in this

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instance, or on third parties. The English law governs in this matter, and we must look to the English decisions and to American jurisprudence, embodying the principles of these decisions, to guide us in adjudicating on the issue raised here. I have not been able to find any case exactly in point, but some of these authorities are instructive, and are, moreover, in a certain degree applicable to the case under consideration. They are cited in the appellant's factum. Daniel on Negotiable Instruments, vol. 1, p. 399, sec. 540, says, "In the third place, the acceptance does not admit the *genuineness of the terms* contained in the body of the instrument; and therefore if at that time they had been altered so as to purport to bind the drawer for a larger sum, or in a different manner than that in the original bill, he will not be bound by his acceptance," and further on in the paragraph he adds, "the acceptor could not only defend against a recovery upon the bill, but might himself recover back the amount paid on it." Again, in vol. 2, p. 327, sec. 1363, we find the following:—"*The admission of the acceptor* extends only to the signature of the drawer, and not the terms of the instrument itself, and when the signature is genuine, but the amount in the body of it has been altered after it left the drawer's hand, and he has paid the excessive amount to a *bona fide* holder, he may recover it back from him, provided he has not himself been negligent in disregarding evidences that the instrument had been tampered with, which appeared upon its face. And as the holder demanding payment warrants the genuineness of the instrument under which such demand is made, we should say that the negligence of the payer should be very great and positive to deprive him of the right of restitution. Appellants also quote same author, vol. 2, p. 325. Parsons on Bills, vol. 2, p. 601, says:—"So a drawer or acceptor may recover back the money he pays on a bill forged in its body, *e. g.*, by increase of the sum, change in time of payment, &c., because he is answerable only for the drawer's signature. But he must not be guilty of carelessness in not noticing a forgery which ordinary attention must have disclosed at once." The case of the Bank of Commerce *vs.* Union Bank, 3 Comstock, N.Y. Reports, page 230, is a leading American case on this question of acceptance and payment by drawee after alteration in the body of drafts, and on the latter's right to recover back an amount so paid by error. This decision was the unanimous judgment of the Court of Appeals for the State of New York; and was based on a careful consideration of all the English cases, which were recognized as binding authorities. The Bank of Commerce, in New York, had been drawn upon by a Bank in New Orleans for $105, which was altered to $1,005, and passed into the hands of the State Bank of Charleston, who sent it for collection to the Union Bank in New York. The Union Bank credited the amount to the Charleston Bank (as Deton was credited by respondents), and presented the draft to the Bank of Commerce, who paid it; but, on the forgery being discovered, returned the draft and demanded repayment; on the refusal, action was taken to recover back the amount, the plaintiff succeeded, and, as before stated, the judgment was unanimously confirmed in appeal. In this case the Judge in the Court below, expressly charged the jury that, "if they were satisfied that the draft had been altered, in the manner before mentioned, after it was issued by the drawers, and that the plaintiffs paid

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the amount of it, as altered, by mistake, and without knowledge of, or reason to suspect the alterations, they were entitled to recover the amount of money so paid. Also that the rule requiring a banker to know the hand-writing of his customer, as to the signature to a cheque or draft, did not extend to the filling up of the body thereof; and that paying the draft in question under the circumstances, was not, of itself, evidence of any negligence or want of due caution on the part of the plaintiffs." The propositions of this charge were maintained in every respect by the Court of Appeals. The following extracts from the judgment of the latter court show how far the authority of that decision applies to the present case. "If the forgery had been in the name of the drawer, it might not perhaps have been incumbent on those banks to scrutinise the bill, because they might have relied on the drawee's better knowledge of the hand; but the forgery being in the body of the bill, the plaintiffs were not more in fault than the defendants." "The greater negligence in a case of this kind is chargeable on the party who received the bill from the perpetrator of the forgery. So far as respects the genuineness of the bill, each endorsee receives it on the credit of the previous endorsers." Again, further on, "The defendants here, as in that case, have obtained the money of the plaintiffs without right, and on the exhibition of a forged title as genuine, the forgery being unknown to both parties." The Court further remarked that the "defendants could not retain the money because it did not belong to them; and that they had their remedy over against the party to whom they paid the money, until the wrong doer is finally made to pay. If that party should be responsible, or if he cannot be found, the loss ought to fall on the party who, without due caution, took the bill from him." "In cases where no negligence is imputable to the drawee in failing to detect the forgery, the want of notice within the ordinary time to charge the previous parties to the bill, is excused, provided notice of the forgery be given as soon as it is discovered."—*Story on Bills, Par.* 262, 263 *and notes.* In a later case before the same Court, Marine National Bank *vs.* National City Bank, decided in 1874, 59 N. Y. Reports, p. 68, all the above propositions were commented upon and re-affirmed, as undoubted and universally received legal maxims. This last case was one in which a bank first certified and afterwards paid to another bank a cheque which had been raised from $25 to $1,079.96. It was held that it could be recovered back by the bank which had paid it by mistake, from the bank which had innocently received the altered cheque as genuine. The matter was considered as one settled by a long and uniform series of decisions. The Court, per Allen, J., said: "Moneys paid upon cheques and drafts which have been forgeries, either in the body of the instrument or in the endorsements, or in any respect, except the name of the drawer, have uniformly been held recoverable as for money paid by mistake, and expressly upon the ground that payment, as an admission of the genuineness of the instrument, was the same as an acceptance, and only operated as an admission of the signature of the drawer." The fact of the Union Bank having accepted and paid the draft in question has been held by the Court below as fully justifying the Ontario Bank, and relieving them from all responsibility in having accepted a forged cheque and obtained payment of it. The Ontario

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Bank did not present the cheque as on behalf of Deton, but, strictly speaking, rather as their own property. They did not ask any questions or inform the Union Bank of the precautions they had taken. On this point the case of Espy *vs.* Bank of Cincinnati (18 Wall. 604), cited by Allen J., in Marine National Bank *vs.* National City Bank, is very instructive. Here a cheque "raised" from $26.50 to $3,920 was presented by a stranger to the firm of E. H. & Co., who, before cashing it, sent it to the Bank on which it was drawn, for information, whose teller replied, "It is good," or "It is all right," and afterwards paid it; but, on discovery of the forgery, an action was brought against E. H. & Co. by the Bank, and the money recovered back. The Court held in this case as follows:—First, That when money is paid, by mistake, on a raised cheque, neither party being in fault, it may be recovered back as paid without consideration. Second, That when a party to whom such cheque is offered sends it to the bank on whom it is drawn for information, the law presumes that the bank has knowledge of the drawee's signature, and of the state of his account, and it is responsible for what may be replied on these points. Third, That unless there is something in the terms in which information is asked, that points the attention of the bank officer beyond these two matters, his reponse that the cheque is good will be limited to them, and will not extend to the genuineness of the filling of the cheque, as to payee or amount.

So far as these authorities and decisions go, the law as stated seems to me in favor of the appellants. But we must go still further in order to determine whether the law thus enunciated applies to the facts and circumstances of the present case. It is beyond doubt that the amount of this forged draft in the body of the instrument was received by the Ontario Bank in error on a draft by the head office of the appellants at Quebec, on the branch house. Deton, the forger, who deposited the draft in the Ontario Bank, has fled, and no practical recourse can be had against him, although he is the debtor of the Bank of Ontario for the portion of the $5,000 they paid him on his check. Under these circumstances, is it the appellants or the respondents who are to lose this amount? In the last analysis and in the decision of this case, of course, this question presents itself for careful consideration. Deton was not what is to be considered a regular customer of the respondents, though he had on the 17th September opened a deposit account for a small amount with them. On the 21st September he sent his office boy, as he is styled, with the forged draft. The Bank immediately carried the amount, apparently without inquiry, to the credit of Deton's deposit account, intimating, however, to the office boy that it was not to be checked out before the draft was paid. Thereupon the draft was stamped as the property of the Bank of Ontario, and sent over to the Union Bank for payment. There it was immediately paid. Six days afterwards the forgery was discovered, and the amount of the draft, less $25, was claimed from the Ontario Bank as having been paid by the Union Bank in error or without proper precaution. The Ontario Bank opened a deposit account with a forger; it is true the man and his character were unknown; and afterwards in good faith they became his agent for the collection of a forged draft, which was presented to the Union Bank with the Ontario Bank stamp upon it, indicating that it was their

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property, or purporting to be such. The draft when presented was paid, and the forgery in the body of the instrument was so skillfully perpetrated that no scrutiny could detect it. Under these circumstances, which of the two parties is guilty of negligence or of want of reasonable diligence? Surely it cannot be said that the Union Bank is to blame, and if not, and since they are not, we are forced to the conclusion that to the Ontario Bank, giving them credit for all the good faith in the world, must be imputed some degree of negligence, and consequently I hold that they are liable. This liability, it may be urged, the respondents have themselves admitted by tendering to the Union Bank $1,515, part of the amount of the draft then at Deton's credit in the Ontario Bank. Their reserve of their rights in making the tender has no significance whatever in law. They could not mean to reserve their right to recover back the $1,515 tendered, and I am of opinion this was, under the circumstances, a tender of a certain sum on account—nothing more and nothing less. Had the draft been payable ten days after sight and accepted, and, before the draft matured, the forgery had been discovered, would the Union Bank have been liable to pay the amount to the Ontario Bank or to Deton for whom they were acting, and to whom they might have paid the amount of the draft before maturity or payment? I think not. The Ontario Bank was not without some vague suspicion about this draft—inasmuch as they informed Deton's office boy, that checks against the amount would not be accepted till after the draft was paid. This was a wise precaution, but having these misgivings it is not a little surprising, at all events it is to be regretted, that they did not communicate them to the Union Bank. Had such reasonable amount of diligence been observed this case would probably never have come before this Court. Deton was not only an entire stranger, but it does not appear that he ever made his appearance at the Ontario Bank after the date of his deposit on 17th September, but he acted, or rather he operated exclusively, through a third party, his so-called office boy. This off-hand way of dealing with large sums in regard to unknown individuals, having no position, and appearing more in the character of vagrants than otherwise, cannot be accepted. It won't do; and common sense as well as sound principles of law should, I think, determine the case in favor of the appellants. I would reverse the judgment of the Court below, but I am alone of that opinion.

Sir A. A. DORION, Ch. J.—A man describing himself as Charles Deton went to the office of the Union Bank at Quebec, and purchased a draft for $25, payable at the branch office of the Union Bank, at Montreal. This draft was payable with or without advice. The draft was issued at Quebec on the 19th of September, 1877. Deton who had previously, on the 17th of September, 1877, opened an account with the Ontario Bank at Montreal, on the 21st of September deposited the draft raised or altered from $25 to $5,000. The teller who received the deposit informed Deton that the draft would be taken on deposit, but that he must not draw cheques against it until it had been accepted or paid by the Union Bank. The draft was sent to the Union Bank in the ordinary course, and was paid. Subsequently, the Ontario Bank accepted Deton's cheques against the deposit to the amount of $3,500. Six days after the draft was issued, the Union Bank at Quebec discovered that the branch at Montreal had paid a draft

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for $5,000 instead of $25, the amount for which it was issued, and the forgery was then discovered. The Union Bank thereupon requested the Ontario Bank to pay back the difference of $4,975. The latter declined to assume the loss, but offered to give the $1,515 which remained at the credit of Deton. The present action was then brought for the $4,975. The question is, who should bear the loss? The general rule is that every one who passes, innocently or otherwise, a forged commercial instrument, is bound to account for it. Two exceptions, however, have been made to that rule; first, if a bank accepts a forged cheque of its own customer, and the forgery consist in the signature of its customer, it cannot recover the money, because it is bound to know the signature of its own customer. But that does not apply to the writing in the body of the instrument, because the bank is not bound to know the handwriting in which the document is written. The second exception which I find is this, that, if a bank takes its own bank bills, and they are forgeries, it cannot recover from the innocent party from whom they were received. I find only one case on this point. It is the case of the Bank of the United States, and the Bank of Georgia, 10 Wheaton 333, decided by Judge Story—and wherein the learned Judge held that a Bank was bound to know its own paper, and if it accepts its own notes or bills, and they are forged, it has no recourse except against those privy to the fraud. That decision does not reach the present case, for this is not an ordinary bank bill of the Union Bank, but it is a draft issued by that Bank, thus coming very near to the case decided by Judge Story, though not quite like it. The jurisprudence being deficient on the point, we must see what principles can be found for our guidance. The Ontario Bank did not cash this draft at the time it was received. They took it on the special condition that it must be paid by the Union Bank, before checks were drawn against it. Therefore, if the Union Bank had not paid the draft, the Ontario Bank would not have lost anything. The Ontario Bank was misled by the only party who could know what was the amount of the draft. The Ontario Bank took the precaution to ascertain whether it would be paid, and it was led by the Union Bank into the error of believing that the draft was really a genuine draft. It is a principle of both English and French law that where one of two innocent persons has to suffer a loss, the one through whose fault or carelessness the loss has occurred must bear it. The party in fault here is not the Ontario Bank. If this bank had paid the money at once, the loss would not have occurred in consequence of the information given by the Union Bank. But the loss was subsequent to the false information given by the Union Bank, and under these circumstances it is clear to my mind that the loss must be borne by the Union Bank. It may be argued that the Union Bank was not bound to know the handwriting of the draft, but only the signature, but there is no decision that goes to that extent. If we take the French law, there is no doubt that the Union Bank would have to lose. See Bédarride, de la Lettre de change, No. 377; Pothier, Contrat de Change No. 101; and Pardessus, Droit Commercial, No. 450. But it is a case governed by English rules, and I think that, while there is no case quite in point, the principles of English law lead us to the same conclusion. The remarks of Rappallo, J., in the case of the

National Bank of Commerce *vs.* the National Mechanics' Banking Association (45 New York Rep. 211) are very applicable to this case. "If (said the learned Judge) the defendant had shown that it had suffered loss in conse- "quence of the recognition by the plaintiff of the check in question, the defen- "dant had paid out its money to its fraudulent depositor, then clearly, to the "extent of the loss thus sustained, the plaintiff should be responsible."

There is no doubt that in the present case the money was paid by the Ontario Bank through the mistake of the Union Bank, and on the principle that the loss must be borne by the party who by his negligence has been the cause of it, we think that the judgment must be confirmed.

It might be different if the Ontario Bank had paid the draft without any reference to the Union Bank, for in that case it might be said that it had assumed the risk of the instrument not being genuine, and would have lost nothing by the mistake of the Union Bank. As this point does not come up in this case, we do not wish to be understood as expressing any decided opinion upon it.

RAMSAY, J.:—This case has to be decided by the law of England as it stood on the 30th May, 1849, Art. 2340 C. C. The date is unimportant in the present case. It seems to be unquestionable that according to that law the acceptor of a bill, the signature of which is genuine but altered as to amount since it passed from the hands of the drawer, and who had paid the same, could recover back the amount he had overpaid owing to the forgery. The cases of Smith vs. Chester (1 Durn. & E. 654), and Jones vs. Ryde (5 Taunt. 487) support this pretension. In the latter of these cases Chief Justice Gibbs points out the distinction between the case before him and the case of Price vs. Neale (3 Bur. 1354) and the case of Baillie vs. Gingell (3 Esp. 60.) It is quite evident, on general principles, that this must be true. The acceptor or payee got no value for his money, and consequently he had a right to recover back what he had paid, precisely on the same principle that any one who had received a counterfeit shilling from another by mistake could recover back his money. But it is contended that the acceptance differs from payment in this, that the acceptance is a deliberate recognition and a warranty of the whole bill. If this proposition be true then there is an end to the discussion, but the authorities cited by appellant contradict this pretension. Daniel distinctly says the acceptor guarantees the signature and not the body of the bill. The one he has means of knowing about, the other he has not. The same doctrine is laid down in the case of the National Bank of Commerce in New York and the National Mechanics Banking Association of New York cited by respondent. Indeed, it is difficult to understand how any other doctrine could prevail. Starting from this point, appellants contend that they were not bound to know that the draft had been altered, that their acceptance covered only the signature, which was genuine. They say, moreover, that they were led into error by the fact that the draft had passed by the Ontario Bank,—that if the unknown Deton had presented the draft himself they would have made enquiry, which would have resulted in discovery. In a word, they say the Ontario Bank had passed upon them a forgery, and that, therefore, the respondents were obliged to return them the money and exercise

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their recourse against Deton. This position is doubtless very strong, and if it had been supported by authority, I should not have felt disposed to alter the rule. Nevertheless, I do not think the argument perfectly sound. As we have already seen, the acceptor is held by his acceptance so far as to recognize that the signature, which he is presumed to know, is genuine. It seems to me that when a bank is dealing with its own paper it should be presumed to know not only the signature but the whole document. It was the appellants who set the whole thing in movement, and by the signature of their cashier gave currency to a draft which they themselves did not know was forged. They were so secure that they ordered their branch to pay "with or without advice." It seems to me that any other doctrine would lead to inconvenience, and that if this does not hold good for drafts, it would be difficult to say why the rule should obtain with regard to bank notes. In the case already cited from the 55 New York Reports, Rapallo, J., seemed to hold this doctrine, and I know of no authority which supports the contrary. I would not base this on the idea of there being negligence, but on policy. It does not appear that the failure to advise amounts to negligence. The evidence shows that advice was not considered necessary before this case happened, and it is manifest the miscarriage of the letter of advice could not alter the responsibility. I am therefore inclined to confirm. But in addition to this there is the fact that the Ontario Bank did not act without the greatest precaution. They did not pay away their money until they had been themselves paid by appellants.

CROSS, J. The facts having been already explained and no controversy arising on them, I will not recapitulate them. Beginning with the maxim that money paid in error may be recovered back by the party who has innocently made the mistake of paying what he did not owe, and conceding that the case of the payment of a draft or bill of exchange is in general no exception to the rule, it only becomes necessary to deal with such exceptions as have been sanctioned by recognized precedents. An admitted exception is where the drawee of a bill pays it, thus recognizing the signature of the maker. He must bear the loss if it turns out that the maker's signature is forged. This exception has been limited to the signature alone, and has not been extended to a forgery in the body of the instrument, whereby its amount has been increased. It is well established by numerous decided cases that such alteration does not preclude the recourse of the drawee to recover back the amount so paid by him unless he has himself been guilty of some act of negligence to prejudice the holder. This exception was extended by Mr. Justice Story in the case of the U. S. Bank *vs.* The Bank of Georgia, 10 Wheaton, p. 332, to the case of a Bank receiving a payment in its own notes, in the body of which there had been forgery committed by raising the amounts of the bills, but in that case, considerations of public policy connected with the character of the bills as currency entered largely into the reasoning of the Court, and were much relied upon. It is an authority in favor of the respondents, but is not conclusive. It assumes that a bank should be acquainted with its own notes, so as to detect a forgery, but in that case facts of actual negligence were proved: First, that the Bank at the time of receiving the bills had in its possession a register of the bills,

a reference to which would have enabled them to detect the forgery; secondly, they had private marks on their own bills sufficient to enable them to detect the forgery readily, had they exercised a moderate scrutiny, which they failed to do. I cannot satisfy myself that the general reasoning there used to the effect that a Bank should know its own bills, would apply with much force to the present case. A draft may be written out by any one, and, although it is usually made out by a clerk of the establishment whence it emanates, that clerk may be a casual employee or one very recently entered. If the head office, in place of being at Quebec, were at a great distance, as in Australia, Japan or China, the agency here would not be very likely to know the handwriting of the different clerks who might be employed in filling up the blanks in the Bills they might have occasion to draw on their branch here. I see no very satisfactory difference between this case, and that of a bill filled up by any other correspondent who might in fact happen to be drawing many more bills than would be the case between parties circumstanced as in the present case; so that the clear distinction between the recognition of the forged signature of the drawer and the recognition of a bill, the body of which is forged by increasing its amount, is not much affected by the reasoning used in that case when applied to one like the present, nor to convince one that the agency here should be so acquainted with bills drawn by its head office at Quebec, as to enable it to detect a forgery in the body of any one that might have been so tampered with. It has even been held with regard to cheques, that where a bank had certified a cheque which was thereafterwards, and before presentation for payment, altered so as to call for a larger sum, and the bank afterwards, through mistake, paid the larger sum, it had a right to recover back from the payee the difference between the original and the increased sum. See Morse on Banking, Edition of 1879, p. 359.

The Union Bank of Lower Canada and The Ontario Bank.

The strongest argument to my mind is, that if the Ontario Bank had to account for the surcharge in the bill in question, they would be damnified by a mistake first committed by the Union Bank. The Ontario Bank declined to take the draft otherwise than as a deposit, not to be drawn against until they ascertained that it would be paid by the Union Bank. They paid no money to the depositor Deton until they had actually recovered it from the Union Bank.

The Ontario Bank did not take the check from Deton as money, but in effect merely to act as agents in the collection of it. On the morning of the 21st September, 1877, they had collected the amount from the Union Bank, who had, without objection, paid it. The Ontario Bank had risked nothing, and up to that time had made no loss. They were in funds by the voluntary act of the Union Bank. The payment by the Union Bank was in effect a payment to Deton. It was not like as if the Ontario Bank had taken the cheque for value paid out, and were collecting the draft to indemnify themselves against the risk they had already run, and the loss incurred if the bill proved bad. On the contrary, they were simply parting with the money they had collected on account of their customer. Had the Union Bank not committed the mistake of paying the bill the Ontario Bank could have lost nothing. I think, therefore, the fault committed

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was that of the Union Bank. It first made the mistake, the consequence of which they now seek to cast on the Ontario Bank. I think the damage suffered is the consequence of their own error if not imprudence, which in a case so evenly balanced ought to make the loss fall on themselves. In the case of the National Bank of Commerce *vs.* the National Mechanics Banking Association of New York, (55 New York Reports, p. 211), the learned Judge makes the following remark: If the defendant had shewn that it had suffered loss in consequence of the mistake committed by the plaintiff, as, for instance, if, in consequence of the recognition by the plaintiff of the cheque in question, the defendant had paid out money to the fraudulent depositor, then clearly to the extent of the loss thus sustained, the plaintiff should be responsible. All the cases where the money paid has been allowed to be recovered back admit, that if there be fault on the part of the party paying, or if, from want of diligence on his part, the holder to whom the payment has been made would suffer, he is not bound to refund. See Morse on Banking, p. 327 to 359.

Judgment of S. C. confirmed.

Lunn & Cramp, for appellant.

Abbott & Co., for respondents.

(S. B.)

COURT OF REVIEW, 1880.

MONTREAL, 29TH OCTOBER, 1880.

Coram MACKAY, J., TORRANCE, J., RAINVILLE, J.

No. 227.

Terriault vs. *Ducharme.*

HELD:—1. That the detailed statement of election expenses delivered to the Returning Officer (as required by sec. 123 of the Dominion Elections Act of 1874) must include the personal expenses of the candidate as defined by sec. 125 of the same Act.

2. The Court may in its discretion reduce the amount of penalty imposed on a candidate, for not delivering a detailed statement in conformity to the law.

The action was instituted by the plaintiff for the recovery of $600, penalty for neglecting to file the detailed statement of election expenses in connection with an election for the county of Berthier, in which the defendant was a candidate.

The defendant pleaded that neither he nor his agent had expended any money, in connection with the election, of which he was bound to render an account. He added that he had paid out $2.45 for personal expenses, of which he had delivered no account, not considering it necessary, but he offered to consent to a judgment for $10 and costs, if the Court should hold that a statement of such expenses was required by law.

The following clauses of the Act of 1874 relate to the point in question:—

Sec. 121. "No payment (except in respect of the personal expenses of a candidate), and no advance, loan or deposit, shall be made by or on behalf of any candidate at any election, before or during or after such election, on account of such election, otherwise than through an agent or agents," &c.

Sec. 123. "A detailed statement of all election expenses incurred by or on behalf of any candidate, including such expected* payments, as aforesaid, shall, within two months after the election .....be made out and signed by the agent .....(including the candidate in cases of payments made by him), and delivered with the bills and vouchers relative thereto to the Returning Officer."

Sec 125. "The words 'personal expenses,' as used in this Act, with respect to the expenditure of any candidate in relation to the election at which he is a candidate, shall include the reasonable travelling expenses of such candidate, and the reasonable expenses of his living at hotels, or elsewhere, for the purpose of and in relation to such election."

JETTE, J. (in the Superior Court), maintaining the plea, 31st March, 1880, made the following observations:

Aux élections fédérales de septembre 1878 le défendeur était candidat à la députation, pour le comté de Verchères.

Ni le défendeur, ni son agent n'ont transmis aucun état de dépenses d'élection à l'officier-rapporteur du comté, dans les deux mois après l'election.

Le demandeur allègue, par son action, que le défendeur a fait pendant la dite élection des dépenses dont il était tenu par la loi de rendre compte; qu'il a laissé écouler plus de 30 jours après les deux mois accordés pour fournir cet état, et que, par suite, il est devenu passible d'une condamnation s'élevant à pas plus de $20 par jour, soit $600, et à un emprisonnement de pas plus de deux ans, à défaut de paiement,

Le défendeur plaide:

1o. Qu'il n'est pas responsable de la négligence de son agent, si, toutefois, celui-ci est coupable; mais que son dit agent n'a fait aucune dépense dont il y ait lieu de rendre compte.

2o. Quant à lui, le défendeur, qu'il n'a fait aucune dépense, tombant, à son avis, sous la disposition de la loi, art. 123.

Cependant qu'il a dépensé, pour lui-même:

1o. Pour un souper à *Contrecœur*.....	0.45
2o. Trois repas de son cheval à *Verchères*, et un verre de bière pour lui, le défendeur.....	0.70
3o. Deux repas et un coucher à *Varennes*, un verre de vin, et trois repas de son cheval.....	1.30
En tout.....	$2.45

Qu'il ne se croyait pas tenu de fournir un état de ces dépenses, qui sont les seules qu'il ait faites, et qu'il n'a eu aucune intention de violer la loi, en ne fournissant pas cet état.

Que depuis l'action il a fourni à l'officier-rapporteur un état conforme à ce que dessus, et que pour éviter les conséquences d'une interprétation différente de la loi, et *montrer sa bonne foi*, il consent à ce que jugement soit rendu contre lui pour $10 et les *frais de l'action telle qu'intentée*.

En cas de refus de cette offre il demande que le demandeur soit condamné aux frais de contestation.

* Obviously a misprint in the Statute for "excepted" (Reporter's note).

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Le demandeur répond à ce plaidoyer disant que les dépenses dont le défendeur rend compte sont des dépenses d'élection et que, par suite, sa négligence à rendre ce compte, lui a fait encourir la pénalité demandée, et qu'en outre le défendeur a fait *d'autres dépenses* d'élection que celles mentionnées en son compte.

Il y a donc ici deux questions à résoudre, une question de droit et une question de fait :

1o. Les dépenses mentionnées au compte du défendeur sont-elles des dépenses d'élection, dans le sens du statut ?

2. Le défendeur a-t-il fait d'autres dépenses que celles dont il a rendu compte ?

Sur le *premier point*, il ne peut y avoir aucun doute.

L'art. 121 du statut fédéral de 1874, dit qu'aucun paiement, *à raison de l'élection*, sauf pour les *dépenses personnelles* d'un candidat, ne sera fait autrement que par l'entremise d'un agent. Toutes les *dépenses d'élection* doivent donc être soldées par l'agent électoral ; le candidat lui-même ne peut en faire le paiement, mais si le candidat encourt des *dépenses personnelles*, il peut les solder sans avoir recours à son agent. Pourquoi ? Parceque la loi exige qu'il soit rendu compte des *dépenses d'élection*, et qu'aucun tel compte n'est dû des *dépenses personnelles*.

En effet l'art. 123 dit :

" Un état détaillé de toutes les *dépenses d'élection* encourues par un candidat, " ou en son nom, etc., sera sous deux mois préparé et signé par l'agent, etc."

Et l'art. 125 énonce que : " l'expression *dépenses personnelles*.....com- " prendra tous les frais de voyage raisonnables de ce candidat et ses *frais* " raisonnables *aux hôtels* et autres lieux, où il se retirera, pour les fins et à " l'égard de cette élection."

Notre statut fait donc une exception formelle pour les *dépenses personnelles*, n'exige pas qu'il en soit rendu compte. Il en est tout autrement en Angleterre :

" Within two months after the election.....a detailed statement of all " *election expenses* incurred by, or on behalf of, the candidate, *including pay-* " *ments for his personal expenses in relation to the election*, must be made " out and signed by the agent, etc."

Et la sec. 38 de l'acte impérial 17 et 18 Victoria, ch. 102, explique ce que veulent dire ces mots *personal expenses* : " and the words ' personal expenses ' " as used herein with respect to the expenditure of any candidate in relation to " any election, *shall include* the reasonable travelling expenses of such candidate, " and the reasonable expenses of his living at hotels or elsewhere for the pur- " poses of, and in relation to, such election."

Notre législature, tout en acceptant le sens donné aux mots *dépenses personnelles*, par la loi impériale, a repoussé l'obligation imposée au candidat de rendre compte de ces dépenses, et le laisse libre de les payer lui-même. La prétention du demandeur d'exiger du défendeur non-seulement un compte de ses dépenses d'élection, mais encore de ses dépenses personnelles est donc mal fondée.

Maintenant le défendeur était-il tenu de rendre le compte qu'il a rendu ?

La Cour de Révision a décidé, en novembre 1877, dans deux causes de Gauthier vs. Bergevin, et de Primeau vs. Roy, que lorsque le candidat ne fait aucune *dépense d'élection* il n'est pas tenu de rendre compte.

Dans l'espèce, le compte du défendeur ne mentionnant aucune *dépense d'élection*, il n'était par conséquent pas tenu de le rendre, et son défaut ne peut le soumettre à aucune pénalité.

Sur le second point, c'est-à-dire si le défendeur a fait d'autres dépenses que celles dont il rend compte, la preuve consiste dans la déposition d'un seul témoin, l'hôtelier *Cabana*, chez qui le défendeur a dépensé les *soixante-et-dix centins* mentionnés dans son compte.

Bien que ce témoin déclare que le défendeur, dans l'occasion mentionnée à son compte, a payé pour trois verres de bière, au lieu d'un seul, c'est-à-dire un pour le défendeur, un pour l'aubergiste lui-même, et un pour une personne qui accompagnait le défendeur, cette déposition n'est pas assez précise et assez formelle pour motiver une condamnation contre le défendeur. Ainsi, ce témoin croit que la personne qui accompagnait le défendeur, voyageait avec lui pour son élection, mais il n'en est pas sûr; puis il ajoute que ces trois verres de bière *n'ont pas été pris pour des motifs d'élection*. Et il ne peut pas dire non plus que le défendeur ait dépensé chez lui, ce jour-là, plus que ce qui est mentionné au compte.

Le défendeur interrogé sur ce fait le nie formellement.

L'action du demandeur aurait donc été renvoyée en totalité, si le défendeur n'avait offert lui-même de laisser prononcer jugement pour $10 et les frais, et demandé le renvoi pour le surplus seulement.

Jugement sera donc rendu conformément à l'offre du défendeur pour $10 et les frais de l'action telle qu'intentée, jusqu'à et y compris l'enfilure du plaidoyer; l'action étant renvoyée avec dépens pour le surplus.

The plaintiff inscribed in Review.

MACKAY, J. The plaintiff inscribes in revision. He sued in the Superior Court for $600 (thirty times twenty dollars) for the penalty of sec. 123 of the Dominion Elections Act of 1874. Defendant was candidate at Verchères at the election in 1878, and is charged with having neglected to make and deliver, as required by law, to the Returning Officer a detailed statement of the payments of election expenses made by him. The plaintiff sues by virtue of sec. 109, which makes the penalty his property; it is a sum not exceeding $20 a day for every day's default.

The plea is that he, the defendant, believes that he made no expenses for which he was or is bound to make statement whatever; then he admits that he did, during the election, make expenditures amounting to $2.45, for himself and horse at Contrecœur and Varennes; that he made no statement about them, believing the law not to call upon him to do so; that he has been in no bad faith; that since the institution of this suit he has furnished the Returning Officer with the statement.

Then he confesses judgment for $10 and interest and costs of the action, as brought, up to that time, and prays for the dismissal of the action as to the surplus of demand, with costs against defendant if he refuse the offers, or press his action further.

The judgment complained of has exactly followed the defendant's plea, and is according to it, and has dismissed the plaintiff's action in a degree, with costs against him, that is, costs since the time of defendant's plea and offers.

Terrisult vs. Dusharme.

The Court here finds, as the Judge *à quo* seems to have done, that personal expenditures of a candidate (such as were those admitted by defendant) were and are election expenses, and that detailed statement of them was required, as contended for by plaintiff, but we cannot accept the doctrine that defendant in an action for the penalty could oblige plaintiff to accept any mere offers of compromise, under pain of having costs to pay if refusing them. We do see the defendant to be in nearly as small a sin against the Elections Act as possible; we, therefore think that this is a case in which we may moderate the penalty against him. We have a discretion, and, exercising it, we give judgment for the plaintiff for $30, being one dollar a day for thirty days' default of the defendant, and all costs of suit of the action as brought, and, in default of payment within fifteen days next after day of this judgment, the defendant to be imprisoned in the common jail, &c., for thirty days, unless the fine and costs be sooner paid. Costs in revision against defendant. We give plaintiff no interest—none is ordered.

The judgment is as follows:

"The Court, etc. . . .

"Considering that defendant violated, as is charged, sect. 123 of the Dominion Elections Act of 1874 referred to, and therefore incurred the penalty of it, which the plaintiff, under sect. 109, had right to sue for;

"Considering that plaintiff's action was well brought, and that he was entitled to judgment as has been found, but for a larger amount and not a composition sum, such as defendant tendered and the judgment has declared sufficient;

"Considering that the plaintiff is entitled also to be relieved from the condemnation in costs pronounced against him by the judgment that he complains of;

"Considering that the judgment complained of is erroneous in a degree;

"This Court doth, revising said judgment, reverse the same, and proceeding to render the judgment that ought to have been rendered in the premises, doth condemn the defendant to pay and satisfy to plaintiff a penalty of $1 a day for thirty days elapsed after the delay prescribed to render an account of his expenses under the provisions of the said Elections Act of 1874, to wit, the sum of $30 for the thirty days of defendant's default found, with costs in the Superior Court of the action as brought against said defendant in favor of said plaintiff, *distraits* to J. E. Robidoux, Esq., plaintiff's attorney, and with costs of this Court of Revision against said defendant in favor of said plaintiff, the said sum of $30 and the costs in the Court of first instance to be paid within fifteen days next after this day; in default of which payment it is ordered that the defendant shall be imprisoned in the common jail of this district for thirty days, reckoning from his arrest under this judgment, unless sooner he pay the debt and the said costs."

Judgment reversed.

J. B. Brousseau and *J. E. Robidoux*, for plaintiff.
Lacoste Globensky & Bisaillon, for defendant.
(J.K.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 21st DECEMBER, 1880.

Coram DORION, C.J., MONK, J.P RAMSAY, J., CROSS, J., BABY, A.J.

Regina vs. *Levi Abrahams.*

HELD :—1. (Dorion, C. J. and Cross, J., diss.) That the attorney general, or solicitor general, may delegate to counsel prosecuting for the Crown, the authority vested in him under Sect. 24 of 32-33 Vict. cap. 29, to direct an indictment to be laid before the grand jury for certain offences.

2. That counts for different misdemeanors of the same class may be joined in the same indictment.

3. Where the evidence established that the defendant sold two railway passes, good only to carry a particular person, and which the purchaser could not use except by committing a fraud on the Railway Company and at the risk of being at any moment expelled from the train, that there was evidence to go to the jury on an indictment against the defendant for obtaining money by false pretences.

The present case came before the Court on a Case Reserved by the Chief Justice during the September (1880) Term of the Court of Queen's Bench, sitting on the Crown side, at Montreal.

The Reserved Case was as follows :—

At the last criminal Term of the Court of Queen's Bench at Montreal, the defendant, Levi Abrahams, was indicted for obtaining money by false pretences.

The indictment contained four distinct counts, as follows :

"The Jurors for Our Lady The Queen upon their oath present that Levi Abrahams, on the 25th day of September, in the year of Our Lord 1880, at the City of Montreal, in the District of Montreal, unlawfully, fraudulently and knowingly by false pretences, did obtain from one Thomas Preddy, a certain sum of money, to wit: The sum of twenty dollars currency, the property of the said Thomas Preddy, with intent to defraud;

"And the Jurors aforesaid, upon their oath aforesaid, further present, that Levi Abrahams, on the 25th day of September, in the year of Our Lord 1880, at the City of Montreal, in the District of Montreal, unlawfully, fraudulently and knowingly by false pretences, did obtain from one James Heaton, a certain sum of money, to wit: The sum of twenty dollars currency, the property of the said James Heaton, with intent to defraud;

"And the Jurors aforesaid, upon their oath aforesaid, further present, that Levi Abrahams, on the 25th day of September, in the year of Our Lord 1880, at the City of Montreal, in the District of Montreal, unlawfully, fraudulently and knowingly by false pretences, did obtain from one Thomas Preddy a certain sum of money, to wit: The sum of ten dollars currency, the property of the said Thomas Preddy, with intent to defraud;

"And the Jurors aforesaid, upon their oath aforesaid, further present, that Levi Abrahams, on the 25th day of September, in the year of Our Lord 1880, at the City of Montreal, in the District of Montreal, unlawfully, fraudulently and knowingly by false pretences, did obtain from one James Heaton a certain sum of money, to wit: The sum of ten dollars currency, the property of the said James Heaton, with intent to defraud."

(Signed,) SCHILLER & DANSEREAU,
Clerk of the Crown.

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I direct that this indictment be laid before the Grand Jury.
Montreal, 6th October, 1880.

L. O. LORANGER, *Attorney General.*
By J. A. MOUSSEAU, Q.C.
C. P. DAVIDSON, Q.C.

There was no preliminary examination of the charges before a magistrate, and the indictment was presented to the Grand Jury by the only direction which appeared on its face, and which is signed:

L. O. LORANGER, *Attorney General.*
By J. A. MOUSSEAU, Q.C.
C. P. DAVIDSON, Q.C.

The defendant moved to quash the indictment on the following grounds:

1o. Because the defendant was charged with four distinct offences of obtaining money by false pretences, which could not be joined in the same indictment;

2o. Because the indictment had been preferred, without any of the preliminary formalities required by Sect. 28 of the Act 32-33 Vict. Chap. 29, respecting Procedure in Criminal matters, having been observed, and namely, that it had not been preferred by the direction of the Attorney General or Solicitor General of the province of Quebec, or of a judge of this Court, or of any judge of the Superior Court for Lower Canada having jurisdiction, and without any preliminary investigation before a magistrate, and without the prosecutor having been bound by recognizance to prosecute the defendant or give evidence against him, and without the defendant having been committed to stand his trial upon the said charge, or detained in custody, or bound over on recognizance to answer the said indictment.

This motion was supported by affidavit; I rejected it, intimating at the time that as I had some doubts, principally on the second objection urged, I would reserve the case, should the defendant be convicted.

The defendant was tried on the 26th of October last, and acquitted on the first and second counts, but found guilty on the third and fourth counts, laid in the indictment.

The evidence adduced at the trial was that, on the 25th of September last, the defendant sold to Thomas Preddy and James Heaton, two persons recently arrived in the country, a pass issued by "The Grand Trunk Railway Company" in favor of A. Carey, and one, entitling the said A. Carey and another to travel on "The Grand Trunk Railway" from Montreal to Port Huron, up to the 30th September now last past, and another pass issued by "The Chicago and Grand Trunk Railway Company" in favor of A. Carey and one, entitling the said A. Carey and another to travel on "The Chicago and Grand Trunk Railway" from Port Huron to Chicago from date to 27th August, 1880, which last pass was then out of date by effluxion of the time for which it had been issued, he, the defendant, representing to the said Preddy and Heaton that these passes were valid, and would entitle them to be conveyed from Montreal to Chicago by "The Grand Trunk Railway" and by the "Chicago and Grand Trunk Railway" respectively, while it was proved that these passes were of no value to the said Preddy and Heaton, as the first pass, which was not transferable, could

only be used by A. Carey and another person travelling with him, and the time for using the second pass had already expired. The price paid for the two passes was twenty dollars, of which ten dollars were of the monies of Thomas Preddy and ten dollars of the monies of James Heaton, the whole amount, however, being paid through Preddy.

The passes were not shown to Preddy and Heaton until after they had paid the money, and they were then informed that one of them would have to pass by the name of A. Carey, to which no objection was taken; both Preddy and Heaton swore that they did not understand what this meant, until they read the condition that the passes were not transferable, after leaving defendant's store.

I reserved the sentence, and the defendant is now on bail to appear before the Court of Queen's Bench, on the appeal side, and also at the Criminal term on the 24th of March next.

I now beg to submit, for the consideration of the Court of Queen's Bench, the following questions:

1o. Whether the Attorney General could delegate his authority, to direct that the indictment in this case be laid before the Grand Jury, and whether the direction as given on the indictment was sufficient to authorize the Grand Jury to enquire into the charges and report a true Bill;

2o. Whether if the indictment was improperly laid before the Grand Jury it should have been quashed on the motion made by the defendant;

3o. Whether the several counts could properly be included in the indictment;

4o. Whether the rulings on the above questions are correct, and whether there was sufficient evidence of false pretences to justify a conviction on the third and fourth counts of the indictment.

Montreal, 30 October, 1880.

A. A. DORION, *Chief Justice.*

DORION, C. J. (*diss.*)—This is a reserved case on a conviction for obtaining money by false pretences.

The indictment contained four counts.

By the first count, the defendant was charged with having obtained by false pretences on the 25th of September last (1880) $20 from one Thomas Preddy:—by the second count, he was charged with having obtained $20 from one James Heaton:—by the third count, with having obtained $10 from Thomas Preddy, and by the fourth count, with having obtained $10 from James Heaton, each count alleging that the money was obtained by false pretences on the same day,—the 25th of September.

This indictment was submitted to the Grand Jury in the last September term, by the direction appearing on the face of the indictment, as follows:

"I direct that this indictment be laid before the Grand Jury.

"Montreal, 6th October, 1880.

L. O. LORANGER, *Atty General.*

By J. A. MOUSSEAU, Q.C.
C. P. DAVIDSON, Q.C."

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A true bill having been found by the Grand Jury, the defendant moved to quash the indictment:

1st. Because the defendant was charged with four distinct offences of obtaining money by false pretences, which could not be joined in the same indictment.

2nd. Because the indictment had been submitted to the Grand Jury without the preliminary formalities, required by section 28 of the Criminal Procedure Act of 1869 (32-33 Vict. c. 29), having been observed.

This motion was supported by the affidavit of the defendant who specially negatived the observance of any of the preliminaries required by the Act.

After hearing counsel, I allowed the case to proceed, intimating at the time that I would reserve the questions raised, should the defendant be found guilty.

At the trial, the defendant was found guilty on the two last counts of the indictment and not guilty on the two first.

The questions reserved are:

1st. Whether the Attorney General could delegate his authority to direct that the indictment be laid before the Grand Jury, and whether the direction as given on the indictment was sufficient to authorize the Grand Jury to enquire into the charges and report a true bill.

2nd. Whether, if the indictment was improperly laid before the Grand Jury, it should have been quashed on the motion made by the defendant.

3rd. Whether the several counts could properly be included in the indictment.

4th. Whether the rulings on the above questions are correct, and whether there was sufficient evidence of false pretences to justify a conviction on the third and fourth counts of the indictment.

It was proved, at the trial, that Preddy and Heaton went, on the 25th of September last, to the defendant's shop, in St. James Street, and that the defendant sold them for $20, they paying $10 each, two railway passes, representing to them that they were valid passes, and would enable them to travel by the Grand Trunk Railway, from Montreal to Chicago. One of the passes was issued by the Grand Trunk Railway Co., authorizing A. Carey and one, to travel on the Grand Trunk from Montreal to Port Huron, and was to expire on the 30th of September last. The other pass was issued by the Chicago and Grand Trunk Railway Co., and authorized A. Carey and one to travel on their road from Port Huron to Chicago. This last pass had already expired before it was sold by the defendant. It was also proved that after having sold the passes, the defendant told Preddy and Heaton, before they left the shop, that one of them would have to take the name of Carey, to which no objection was made; Preddy and Heaton swore, however, that they did not understand the meaning of this until after leaving the shop, when they looked at the passes and found they were not transferable; they then made inquiries, and were informed the passes were valueless.

We are all of opinion that on this evidence the case was properly left to the Jury. The defendant sold to the prosecutors two passes which they could not use, except by committing a fraud, and at the risk of being at any moment turned out of the cars. One of these passes had actually expired, and, although represented as a valid pass, was a useless piece of paper.

We are also all of opinion that the four counts could be joined in the same indictment.

This seems to admit of no difficulty, and from an early period up to the case of The Queen vs. Castro,—known perhaps as the Tichborne case, reported in the last October number of the Law Reports, Appeal Cases, when the Judges in appeal affirmed the verdict found by the jury, on two distinct counts of perjury committed on different occasions, and upheld the sentence of seven years imprisonment for each offence,—there is an unbroken chain of authorities and precedents showing that any number of misdemeanors of the same class may be included in different counts in the same indictment.

In 1789, Young and others were indicted on four different counts, for obtaining money by different false pretences, and were convicted. On a writ of error, Lord Kenyon, said:

"The fourth objection (which was that there should have been two indict-"ments) would be well founded, if the legal judgment on each count was differ-"ent; it would be like a misjoinder in civil actions. But in this case the "judgment on all the counts is precisely the same, a misdemeanor is charged in "each.

"Most probably, the charges are meant to meet the same facts; but if it "were not so, I think they may be joined in the same indictment."

Lord Ellenborough said, in Rex vs. Jones (2 Campbell's Reports, 131): "It "is the daily usage to receive evidence of several libels and of several assaults "upon the same indictment, and here I see not the slightest objection to evi-"dence of various acts of fraud committed by the defendant in his office of com-"missary general, though ranged under different counts as distinct and sub-"stantive misdemeanors."

In Reg. and Compety and five other defendants (9 Q. B. 321, 1846) the defendant were charged with conspiracy in eight different counts, and found guilty on six. A motion in arrest of judgment was rejected.

In Reg. vs. Douglas, 1847 (13 Q. B. 42), the defendant was charged in one indictment with thirty-seven offences of receiving presents from Indian princes. He was convicted on nine counts, and sentenced to a term of imprisonment and a fine on each of the nine counts separately. A motion in arrest of judgment was rejected.

In 1852, an indictment containing six counts for conspiracy and one for obtaining money by false pretences was preferred against Joseph, Caroline and Jane Whitehouse. The Grand Jury returned a true bill against the three on the six first counts, and against Caroline Whitehouse, alone, on the seventh count. The counts varied as to the objects of the conspiracies and false pretences, and also as to the persons defrauded. Objection was taken to the indictment; but the objection was overruled. (6 Cox, 38.)

There is also the case of Jones (6 Cox, 467) charged with obtaining money by false pretences from four different persons, on different occasions.

In Reg. and Stenson and Hitchman (12 Cox, 111) the defendants were charged in eight different counts with obtaining money by false pretences from different persons, and for conspiracy in a ninth count. Stenson was found

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guilty on every count of obtaining money by false pretences except the first, and both defendants were convicted of the conspiracy charged in the ninth count.

See also Reg. vs. Kerrigan (9 Cox, 441). Reg. vs. Cooper (13 Cox, 124). Lord Hale, P. C., 2 Vol. p. 174. 1 Bishop, Criminal procedure, S. 452.

Greaves in a note, at p. 677 of 2 Russell on Crimes, Ed. of 1865, speaking of an opinion attributed to Maule, J., says, that the case was probably incorrectly reported, "as that very learned Judge well knew that the general rule in misdemeanors is that any number of misdemeanors may be included in the same indictment."

In the case of Castro, already referred to, Baron Bramwell said that "no question was ever submitted to a Court of Justice which offered less difficulty."

Even in cases of felony there is apparently no rule to prevent more than one felony from being charged in the same indictment, although this is seldom allowed in practice, except in cases provided for by statute.

Rex vs. Kershaw, 1 Lewin 219.

Reg. vs. Geo. Henley the elder and Geo. Henley, junior, 2 Moody & Robinson 254.

In Reg. vs. Heywood and others (33 L. J. (M. C.) 133) Baron Pollock said: "It is no objection in point of law that an indictment charges several distinct felonies in so many counts, &c." Blackburn, J., added, "I am of the same opinion, &c."

It is therefore evident that the objection, that the several counts could not be joined in the same indictment, is unfounded.

The other two questions depend on the interpretation to be given to section 28 of the Criminal Procedure Act of 1869, which provides that no bill of indictment for any of the offences therein mentioned, including that of obtaining money and other property by false pretences, shall be presented to or found by the Grand Jury, unless certain proceedings have been adopted, or unless the indictment for such offence is preferred *by the direction of the Attorney or Solicitor General for the Province, &c.*

It is not contended that any of the other proceedings required by this Act to authorize the Grand Jury to find a true bill have been observed, nor that the Attorney or Solicitor General has personally directed or authorized that this indictment be preferred before the Grand Jury, but it is contended that the two Queen's Counsel who were authorized to represent the Crown in all the criminal proceedings during the term, were also empowered in virtue of their general authority to direct, as acting for the Attorney General, that an indictment be preferred before the Grand Jury in any of the cases mentioned in section 28 of the Statute of 1869, and especially in the case of a charge for obtaining money by false pretences.

I have the misfortune of dissenting from the majority of the Court upon this question, and as my dissent is of some importance to the defendant, who is thereby enabled to obtain a further examination of his case, I will endeavour to explain the grounds of my dissent.

The question is simply whether the authority conferred by the statutory provision now under consideration is one that can only be exercised by the Attorney or Solicitor General personally, or whether it is one which they can delegate to any person authorized to represent the Crown in proceedings before the Criminal Courts of the Province.

The object of this provision is well indicated by the title of the Imperial Act, 22 and 23 Vict. c. 17: "An Act to prevent vexatious indictments in certain "misdemeanors"—and more fully explained by Archbold—Criminal Pleading, p. 4 of 17th Ed.

These safeguards against unjust prosecutions were introduced here in 1861, by the 24th Vict. c. 10, which is a transcript of the Imperial Statute.

There was before this last Statute "An Act to make better provision for "the punishment of frauds by trustees, &c." (22 Vict. c. 2, 1858), which contained the following provision:

Sect. 13. "No proceeding for an offence included in the first section, but not "included in any other section of this Act, shall be commenced without the "sanction of Her Majesty's Attorney General, or, if the office be vacant, without "the sanction of Her Majesty's Solicitor General."

The offence here referred to was a fraud by a bailee, which, by the first section of the Act, was made a misdemeanor.

This provision requiring the authority of the Attorney General, or, in case of vacancy in the office, that of the Solicitor General, was incorporated in the ch. 92 of the Consolidated Statutes of Canada, sect. 64, and remained in force until 1869, when, by section 81 of the Larceny Act (32-33 Vict. c. 21), it was altered so as to require the authorization of the Attorney General or Solicitor General instead of that of the Attorney General, and in case of vacancy in the office, that of the Solicitor General.

There is also a provision in the Act respecting offences relating to the coin (32-33 Vict. ch. 18, sect. 17), directing that it shall not be lawful for any person to proceed for any such last mentione d penalty without the consent of the Attorney General. The Solicitor General is not here mentioned.

All these provisions are *in pari materiâ*. They are for the protection and liberty of the subject, and as such must be construed liberally, in the sense most conducive to the attainment of the object they have in view.

Before the repeal of the 22 Vic. c. 2 it would have been impossible to hold that the Attorney General had the right to delegate his authority in matters within the Act, in presence of a provision which so clearly indicated that the authority should proceed from him personally and from no other, except in the case of vacancy of the office, when the Solicitor General could act in his stead.

In the case of Wilkes (4 Burrows 2527) the question was mooted whether the Solicitor General could prefer an information in his own name, when the office of Attorney General was vacant, and the question was considered of sufficient importance that Lord Mansfield, on rendering the judgment, openly declared that if he was Attorney General he would at once allow a writ of error to bring the case before the House of Lords, and yet there was no Statute directing that an information should be preferred by the Attorney General, it was a mere matter of practice, and the question was decided as one of prerogative.

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Among the rules for the interpretation of Statutes given by Dwarris, p. 767, is the following: "Where an Act of Parliament gives authority to one person expressly, all others are excluded; and a special power is ever to be strictly pursued."

Another rule is that a delegated authority cannot be re-delegated. *Delegata potestas non potest delegari.*

In the case of a public officer authorised to appoint a deputy, it has been held that such a deputy, unless specially authorised by statute, could only discharge ministerial duties, and not the judicial functions appertaining to the office. "A "Magistrate, as Lord Cawden remarked in Enrich and Corrington (19 Howell "State trials 1063), can have no assistant nor deputy to execute any part of his "employment. The right is personal to himself, and a trust that he can no more "delegate to another than a Justice of the Peace can transfer his commission "to his clerk."

A delegated authority can be executed only by the person to whom it is given, for the confidence, being personal, cannot be assigned to a stranger (Paley on Agency 175).

"It may be laid down as a general rule" (says Paley on Summary Convictions, p. 57), "that a ministerial officer, may, but a judicial officer cannot, appoint a "deputy."

"The test whether an act is judicial or ministerial is, whether the justices "are entitled to withhold their assent, if they think fit, or whether they can be "compelled by mandamus or rule to do the act in question." Weightman, J., in Staverton vs. Ashburton (4 Ellis & Blackburn 531).

Applying that test in the present case (and it is not an unreasonable application of it, for the authority conferred on the Attorney General by the Statute is of the same character as that exercised by the Magistrate when he commits a person accused of an offence in order that an indictment be submitted to the Grand Jury;—it is also the same as that which is conferred on the Judges of the Superior Courts by the same clause of the Statute), it is clear that the power conferred by the Statute on the Attorney General is a discretionary power, and therefore a judicial, as contradistinguished from a ministerial or purely formal act.

In a case of Lyon vs. Jerome (26 Wendell 485) Senator Verplank, in rendering the judgment, made the following remarks, which are perfectly applicable to the present case:

"In all cases of delegated authority (said the learned Judge), where the "delegation indicates any personal trust or confidence reposed in the agent, "and specially where such personal trust is implied by making the exercise and "application of the power subject to the judgment or discretion of the agent or "attorney, the general rule is, that these are purely personal authorities, incapable of being again delegated to another, unless a special power of substitution "be added. From an early period of our law, this rule has been laid down as to "powers given by will or deed, to executors, trustees and attornies, &c., &c., and "modern decisions have extended the principle to less formal appointments of factors, brokers and other commercial agents. *How much more strongly, then, must*

" the reason of the rule apply to the delegation of authority by the state, to its " high public officers made with the solemnity of a legislative Act ? The lan- " guage of the Statute, as well as the nature of the trust itself, shows that this " is an authority confided to the judgment and discretion of the commissioners, " for the impartial discharge of which they are responsible to the state."

It is the judgment of the Attorney General or of the Solicitor General which is to determine whether or not a charge of any of the offences mentioned in the Act, is vexatious or not, and whether an indictment ought to be laid before the Grand Jury, and not that of the person whose duty it is to represent the Crown in criminal proceedings, whether such a person be a Queen's Counsel or simply a Clerk of the Crown or Clerk of the Peace; for these officers are also authorized to represent the Crown in criminal proceedings in the absence of any other representative of the Attorney General.

No distinction can be made, and if a Queen's Counsel representing the Crown in a Criminal Court has the right to direct that indictments for obtaining money by false pretences, &c., be preferred to the Grand Jury, simply because he represents the Attorney General for the prosecution of Criminal cases before the Court, the same right cannot be contested to other representatives of the Attorney General in every district of the Province.

Judge Blackburn in the case of the Queen vs. Bray (9 Cox, 217) said :— " As a matter of discretion and of practice in these cases, I have refused to " interfere, directing the parties to go before a Magistrate, where the deposi- " tions of the witnesses would be taken."

When we find that this eminent Judge, in construing this statute according to its true spirit, refused to exercise his discretion in the matter, we may well say that it could never have been the intention of the law that such a discretion might be exercised by all those to whom the Attorney or the Solicitor General might expressly or impliedly delegate his authority.

It is, however, contended that the practice has always been for the Crown prosecutors to exercise this authority ; and, secondly, that our Statute does not require the direction or authorization to be in writing, while the Imperial Act does require it.

As to the practice which is invoked, I cannot say how long it may have existed. I have enquired as to precedents, and I found that the question had never been raised, except once, before me, in the case of the Queen vs. Grothé, in September, 1879, where, as in the present case, I declared that, if the defendant was convicted, I would reserve the point, and, as he was acquitted, the opinion of this Court was not obtained.

Whatever may have been the practice, in the absence of any judicial sanction, such practice, if contrary to the statute, would be abusive, and could not supersede a positive law.

With regard to the difference between the Canadian Statute and the Imperial one, it consists in this, that the words *in writing* have been dropped in the Procedure Act of 1869. These words were not in the 22 Vict., c. 2, nor in the Consolidated Statute, c. 92, sect. 64, yet it cannot be contended that under these statutes, the Grand Jury or the Clerk of the Crown, through whose

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office the indictments are submitted to the Grand Jury, might have received oral testimony of the consent or authority of the Attorney or Solicitor General, for the simple reason that all essential proceedings in a Court of Record must be in writing. These words were unnecessary, and, as such, were left out in the re-enactment of the Criminal laws made in 1869. This disposes of the argument, that, as the direction from the Attorney General is not required to be in writing, his representatives who conduct the Crown business may certify that they are directed by him to prefer the indictment, and that it is what has been done in the present case; but, were it true that the consent or authority of the Attorney General need not be in writing, I found no authority to show that the mere declaration of the prosecuting counsel would be evidence of their having obtained his consent. The authority has been denied by the affidavit of the defendant. That this was the proper course was shown by the case of the Queen vs. Heane (9 Cox, 433). This denial made it incumbent on the prosecution to establish the authority under which the proceedings were taken, and this has not been done.

The question submitted is simply whether the prosecuting counsel could, as the delegates of the Attorney General, authorize this prosecution.

I hold that they could not, and that the indictment was not properly laid before the Grand Jury.

I admit that I have not been able to find any precedent in the English books, but I do not think there is a single instance to be found where, in England, this authority has been exercised for or on behalf of the Attorney General or Solicitor General, and this rather confirms me in the view I take of this case.

Another question arises: Does this want of authority in submitting an indictment to a Grand Jury, affect their general jurisdiction so as to annul their presentment of a true bill against the defendant?

On this point we have the case of Davis (9 Cox, in the note at p. 432)—There Crompton, J., in 1861, quashed one count of an indictment which had not been preceded by the preliminary formalities required by the Vexatious Proceedings Act. We have also the case of Fuidge (9 Cox, 430) where the Court, on a reserved case, set aside the verdict, because one of the counts of the indictment had not been authorized as required by the Act.

This point was raised in the case of Heane, and, although the decision turned upon another point, the Judges sitting in that case do not appear to have expressed a doubt about it, and one of the rulings at the head of the report is, "that an indictment found by a Grand Jury not having jurisdiction may be "quashed at any stage, at the instance of the defendant, even after plea."

In the case of Knowlden (9 Cox, 483)—the point, although raised, was not [illegible] because the Court held that the formalities had been observed. In the course of his remarks, Blackburn, J., said: "If a bill of indictment was improperly preferred, and found, it may be that the more convenient course, when "the fact was discovered, would be to apply to the Court before the trial to "quash it, and I think the Court would have jurisdiction to quash it, or any part "of the indictment as to which the Statute was not complied with."

The last case on this point is that of Reg. vs. Bell (12 Cox, p. 41). In that case the defendant's counsel cited the case of Fuidge.

Smith, J., said: "that is an authority that, in the present state of the pro-"ceedings, I might quash the counts I think not justified by the recogni-"zances."

Later on, he said: "My present impression is that the two last counts are "not within the terms of the recognizances. Unless Mr. Metcalfe can satisfy "me that the Act 30-31 Vict. c. 35, sect. 1 (this Act authorizes the add-"ing of new counts to the original charge to avoid the difficulty which occurred "in Fuidge's case), applies, they must be quashed?"

Metcalfe.—"I quite agree to that; unless it does, we cannot support "them."

The authority of Fuidge was here recognized as well by the Court as by the the Counsel for the Crown.

In the present case the defendant has followed the course sanctioned in England. He has moved to quash the indictment.

I am of opinion, that, according to the precedents referred to, the motion should have been granted, and the verdict should now be set aside.

Cross, J., concurred in the above reasons of dissent.

Ramsay, J. (for the majority of the Court):—The prisoner was indicted for obtaining money under false pretences. There were four counts in the indictment: one for obtaining $20, the money of Thomas Preddy; the second for obtaining $20, the money of James Heaton; the third for obtaining $10, the money of said Preddy, and the fourth for obtaining $10, the money of said Heaton. The defendant was not committed by a magistrate, nor was any one under bond to prosecute, but the bill was placed before the Grand Jury with the following direction:

"I direct that this indictment be laid before the Grand Jury.

Montreal, 6th October, 1880."

(Signed) L. O. Loranger, *Attorney General.*
J. A. Mousseau, Q.C.
C. P. Davidson, Q.C.

The prisoner by his counsel moved to quash the indictment because four distinct offences of obtaining money by false pretences were laid in the indictment, and because the indictment was not laid before the Grand Jury by direction of the Attorney General. This motion was rejected and the defendant was found guilty on the 3rd and 4th counts.

The learned Chief Justice reserved four questions for the consideration of this Court, namely:

1st. Whether the Attorney General could delegate his authority to order a bill to be laid before the Grand Jury;

2nd. If he could not, whether the bill could be quashed on motion;

3rd. Whether the four counts could be included in one indictment;

4th. Whether under the evidence there were false pretences.

On the part of the prisoner it was urged that the direction of the Attorney General must be in writing, that he could not delegate the authority given him by statute, and that in the absence of such authority the Grand Jury had no jurisdiction to find the bill, and that therefore there was no bill on which the

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prisoner could be tried. He argued that the power given to the Attorney General was of a judicial character, as when he entered a *nolle prosequi*, or accorded his *fiat* for a writ of error.

The extreme novelty of these various pretentions clothed them with an interest, which, on examination, I think, their merits will not sustain. The words of the statute are these: "or unless the indictment for such offence is preferred by the direction of the Attorney General or Solicitor General for the Province, etc."

This disposition seems to have been borrowed from the Imp. St. 22 & 23 Vic., c. 17, Sect. 1, which, however, is not in precisely the same terms: "*By the direction* or *with the consent in writing* of a Judge, &c., or of Her Majesty's Attorney or Solicitor General for England, &c."

The reserved case does not contemplate any difficulty as to the form of the delegation, if the Attorney General had the power to delegate at all. Nor do I consider that under our practice there could be any serious question on this point. For the last twenty-five years at least the whole business of the criminal Courts has been carried on by counsel, not always Queen's counsel, on letters missive signed by the law clerk, under the instructions of the Attorney General. So far as I know, these authorizations have never been produced save on one occasion, and none are of record in the Crown office. I think, therefore, that such powers as the Attorney General can delegate are properly exercised by counsel on their professional responsibility.

It appears to me that this enactment is purely directory, and that it in no way affects the indictment. At different times rules have been made to prevent malicious and vexatious prosecutions for misdemeanours, but I do not know of a case on any of the old Statutes where they have been so interpreted as to deliver a guilty party after conviction, or even to set aside an information.

There is a case on the 3 and 4 W. & M., which was passed to compel complainants in certain cases to give security for costs; where the information had been filed without giving this security, the process was set aside, but not the information. R. vs. The Mayor and Aldermen of Hartford, Sal. 376.

We have three cases reported on the Vexatious Indictments Act in England; all decided within a few weeks of each other. The first case is that of the Queen against Fuidge. In that case, which was decided on the 23rd January, 1864, the conviction was quashed because leave as required by 22nd & 23rd Victoria cap. 17, section 1, had not been granted for the second count. A week later a similar application was made in the Queen and Heane, and rejected, ostensibly for the reason that the question, where there was doubt, should be examined by a Court of Error. On the first of June, 1864, the case of Knowlden and others against the Queen came up in error, and there it was decided that the Statute was directory. There can be no doubt that this is a departure from the decision in the Queen and Fuidge, and one can hardly escape from the conclusion that the change of view of the Court had commenced from the time of hearing the Queen against Heane. It is a return to the ruling on the old Statute of W. & M., as I have already shown. In the case of Knowlden and the Queen, Cockburn, C. J., said: "As regards the first question, whether the condition re-

quired by the 22nd and 23rd Vict. as a condition preliminary to the presenting to, and finding of the indictment by the Grand Jury, must appear on the face of the record, it appears to me that it is not necessary. It is true that, in general, whatever is necessary to give jurisdiction must appear on the face of the record, but that rule is subject to the qualification pointed out by my brother Blackburn during the argument. Here it is not a condition attached to the jurisdiction of the Grand Jury over the offence. The moment the condition is complied with, the Grand Jury are seized of the matter, and the offence need only be stated in the indictment, in the usual form. Nothing could be more inconvenient than that matters of this description should be stated on the record, for it would follow that they might be put in issue, and then it would be necessary in every case within the Act, to try the question before the petty Jury, whether the accused had been committed or bound over to answer the subject of the indictment. That could not have been the intention of the Legislature. No doubt there ought to be in some way enough evidence to satisfy the Grand Jury that the condition of the Statute has been complied with, but when that is done, the Grand Jury exercise the same jurisdiction as they exercised before the Act. Where the parties and the prosecutor have been bound over to prefer the indictment, the accused must be aware of the fact, or, if he has any doubt, the fact may, on enquiry, be readily ascertained. Supposing a prosecution to have been improperly instituted and a deception practised on the officers of the Court as to the preliminary conditions having been complied with, there can be no doubt that redress can be had in some way; whether by application to the Judge, before the trial, to quash the indictment, or whether, when it comes to the party's knowledge at a later period by some other proceeding, it is not necessary now to decide. It is enough to say that redress can be obtained in some way. I think therefore that, with reference to the first question, the argument of the defendant fails.'

Crompton, J., said:—"The officer of the Court has every commitment sent to him, and he knows whether there has been a committal or not in each case. Through his office the indictment must pass on its way to the Grand Jury, and it is very much like a direction to him to take care that an indictment shall not be presented to the Grand Jury until the condition of the Statute is complied with."

Blackburn, J., said:—"The Vexatious Indictments Act" puts, as a condition, that, before any bill of indictment for any of the offences specified shall be presented to or found by the Grand Jury, certain things shall be done. It does not alter the nature of the offences or the general jurisdiction of the Grand Jury. If the thing required constituted any part of the offence, then they would be a matter of trial before the petty jury; but that is not so—they are only a condition, put on the general jurisdiction of the Grand Jury to find a bill of indictment in the cases specified. It is precisely the same as the case of vexatious criminal informations. It has never been the practice to aver in a criminal information that leave has been obtained to prefer it, but the mode of pleading remains the same as at common law before the 4 and 5 Will. and M. passed." Shee, J., said:—"The Legislature must be taken to know the mode in which indictments are usually preferred, and that they pass through the hands of the officers of the Court to the Grand Jury. I think that the Statute is nothing more than a direction to

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those officers to take care that no bill shall be presented to the Grand Jury unless the requisitions of the Statute have been complied with. I think the Legislature might have had in view the 4 and 5 Will. and M., for the Act of 22 and 23 Vict. contemplates the same evils. I think that if it came to the knowledge of the Court that a bill of indictment had been found without the requisition having been complied with, it might be treated as a nullity, and as if it had not been found, and that the Court might quash it."

In the last remark of Mr. Justice Shee as well as in what precedes, I cordially concur; but it is one thing to say a bill may be quashed in the discretion of the Court before trial, and quite another to say that after verdict it should be set aside.

Since this last case, I have seen nothing which should change the inference to be drawn from the contrast of the case just mentioned and that of the Queen vs. Fuidge.

It is not, however, necessary to consider this point further, for the pretension of the Crown in the present case is, that the bill was laid before the Grand Jury by the direction of the Attorney General signified in the ordinary mode. We have then only to enquire whether the Attorney General can delegate his authority or rather whether he can employ counsel to convey his direction. The words of the Statute are first to be considered. In them we find no justification for the prisoner's pretension. The indictment is to be laid before the Grand Jury *by the direction* of the Attorney General. It is not easy to conceive why these words should be tortured into an obligation on the part of the Attorney General to give this direction in each case under his own hand. The inconvenience of laying down such a rule appears to me to be as evident as its illegality. By comparing our Act with the Act from which it was copied, and which I have already mentioned, it is evident that there is a distinction to be observed. In England the prosecution is laid by the direction or the consent in writing of the Attorney General, while here, where the practice is totally different, owing to the fact of there being always an authorized prosecutor, it was only necessary to say, by the direction of the Attorney General, and no writing is required. To add a condition to a restrictive Statute of this sort borrowed from another legislation, less the condition, is a totally unscientific proceeding.

It has been argued that the direction of the Attorney General is a judicial act, and that therefore it cannot be delegated. I can hardly fancy any act, that is not a pure formality, being less judicial in its character. He simply permits a prosecution to be commenced without the formality of a commitment.

But, it has been likened to filing a *nolle prosequi*. The illustration is not conclusive. The Attorney General rarely files a *nolle prosequi*, in person, in England. The usual form was to issue his fiat, because there was no one occupying the position to which we have attached the title of "Crown Prosecutor." Here, no such formality has been practised, for thirty years at all events, if ever. On one occasion, when I represented the Attorney General in this District, the question of my authority to enter a *nolle prosequi* for the Attorney General was raised, and I produced nearly a hundred instances of the discontinuance of proceedings certified precisely as in this case. The presiding Judge

then, overruled his former decision and allowed the discontinuance to stand. This practice has been followed by every person who has represented the Attorney General, and has been sanctioned by every Judge who has held the criminal term, in Montreal, for many years.

The strangest part of the argument is the attempt to make the granting of the fiat a judicial act. It happens that the Attorney General is sometimes the counsel for the Crown, and sometimes for the prisoner. If the act be judicial, we should have the Attorney General acting as a *Juge d'instruction* and counsel for one of the parties, an anomaly in legal proceedings. In the case of Reg. vs. Rowlands and others, in which the Attorney General appeared as counsel for the defendant Green, we find that the *nolle prosequi* was entered by the counsel for the Crown, with the assent of the Attorney General. The fiat, then, is not essential. I presume, too, that if the Attorney General were indicted it would be possible for the Crown to file a *nolle prosequi*, but he certainly could not sign the *stet processus*.

A similar argument was attempted to be drawn from the Writ of Error. I do not think it better founded than the illustration I have just referred to. The Writ of Error was at one time issued under the hand of the Sovereign, and it was supposed to be granted *ex gratiâ*. Granting the fiat could hardly then be considered a judicial act; afterwards the fiat was granted by the Attorney General. This was an innovation by practice and not by any statutory alteration of the law.

The case of Castro v. Murray (32 Law Times N. S., p. 675) does not in the least degree tend to sustain the view that the power to grant a fiat for a Writ of Error cannot be delegated. It establishes, on the contrary, that it is due, on proper cause being shown, in misdemeanors *ex debito justitiæ*. The case of Dunlop and the Queen in our own Courts was cited. I conceive that that case can hardly be considered as an authoritative one. The Attorney General was in England, and the office of Solicitor General was vacant. If, then, the rule of the Court was sustainable in law, there would have been no available power to authorize the emanation of the fiat. This is against reason. See remarks of Wilmot, J., in the case of Wilkes, to which I shall later have occasion to refer. It seems to me all these cases necessarily range themselves under the well-known rule that powers that are not judicially conferred on a public officer may be delegated. (Paley on Summary Convictions and the cases there cited, p. 57.) It is very dangerous to draw conclusions from general statements to be found in hand-books, however carefully such works may be prepared, and this danger is augmented when these rules are to be applied in countries for which these books were not written, and where a practice somewhat different from that of England prevails, owing to some cause or another. However, in Archbold's Crim. Pl. & Pr., the doctrine is cautiously laid down, and there we find no such pretention as that urged on behalf of the prisoner. He says: "A *nolle prosequi* to stay proceedings upon an indictment or information may be entered at the instance either of the prosecutor or the defendant *by leave* of the Attorney General, &c." "But, &c., a *nolle prosequi* cannot be entered without the *authority* of the Attorney General, &c."

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Another illustration might be taken from an Information. You find everywhere that it may be filed by the Attorney General or by the Solicitor General. But Wilkes case goes further than this. Lord Mansfield, in referring to Heale's case, said: "The counsel did very right, as between the King's Law Officers, to over-rule Sergeant Heale." This was only between the Attorney General and the Sergeant. In support of this view I would specially direct attention to the opinion of Mr. Justice Wilmot in the case of Wilkes and the Queen, pp. 326 and 327. This agrees perfectly with the principles of *désaveu* in our civil Courts, and it may fairly be assumed that, on no other principles, could the representation of the client be carried on. Nor is there any serious danger of abuse. In addition to the protection afforded by professional organization, the whole proceedings of the advocate *are public*, and particularly so when it is an advocate appearing under a general power from the Attorney General, whose position is as well known as the existence of the Court itself. During the absence of the Attorney General in England, of which I have already spoken, and there being no Solicitor, the Governor General communicated directly with me on two occasions, respecting criminal matters, and one of these occasions, it so happened, referred to the discontinuance of thirteen or fourteen indictments in capital felonies.

Our position would be a strange one indeed, if we were prevented, by the formularies of text-books, from making our practice bend to our requirements. Surely, we have as much right to mould it by usage, as they had in England since the time of Queen Anne. What has grown up since that, is change, it is not common law. Why should these changes of custom be unchangeable here? Such is not the doctrine in England. From the case of Wilkes, already cited, I would quote a *dictum* of one of the most unimaginative and most safe of English Judges. Mr. Justice Wilmot said: "A course of precedents and judicial proceedings in Courts of Justice make the law; it would be endless to cite cases upon it. A course of practice for a few years has been held to control an Act of Parliament." The case of Bewdley Corporation, in the 12th Queen Anne, 1 P. Williams, 207.

In the dissent of the learned Chief Justice, it was said that the test of whether an act was ministerial or judicial was whether the party charged could be compelled to act. I think that is a very imperfect test. A Magistrate may be compelled to hear a complaint, still the act of hearing is judicial. The best test, if there be any possibility of laying down a precise rule, is whether the party charged should hear both parties. But I don't pretend that this is conclusive, so as to be an all-embracing rule. It has also been said that a delegated power cannot be re-delegated. This is true, but not where the first delegation is by the Crown, for most of the acts of the Crown are performed by delegation. For instance the Clerk of Appeals can name a deputy, but the deputy cannot name a deputy. No one ever heard that the Attorney General could not act by deputy.

With regard to the third point there seems now to be no difficulty. In this country it has not been the habit to put prisoners on trial for two offences on one indictment either in misdemeanors or in felonies. In England it appears to

be otherwise, and two or more misdemeanors are frequently charged in the same indictment. There are some cases in which evidence has been taken on several offences, and a few in which double penalties have been inflicted. When we come to felonies it seems that, strictly speaking, an indictment is not bad in law because it sets up more than one felony in different counts.

If the *dictum* of James, L. J., in the case of Castro and the Queen (14 Cox, 446) is intended to express this and no more, it may be easily defended; but if we are to understand that the learned Judge meant, that any person may be tried, convicted and sentenced for two or more separate felonies set forth in the same indictment, except where allowed by Statute, and that this would be good in law, then I must be permitted to say that I have found no authority for such a doctrine.

When we are told that whether or not the prosecutor shall be put to his election is within the discretion of the Judge, nothing more is meant than this, that it is discretionary with him to decide whether the counts set up distinct felonies, or are only variations of the narrative of one transaction. In other words, the multiplication of counts in an indictment for felony is to avoid the failure of justice owing to variations, and not with the object of allowing the Judge in his discretion to try a prisoner at once for the murder of A at Mile End on one day and for the murder of B at Lachine a week later. Of course, it is no ground for demurrer or for motion to arrest the judgment, and so we find the rule laid down thus carefully by Chitty (Cr. Law 252-3). "In case of felony, no more than one distinct offence or criminal transaction at one time should regularly be charged upon the prisoner in one indictment, &c. But this is only matter of prudence and discretion which it rests with the Judge to exercise. For in point of law, there is no objection to the insertion of several distinct felonies of the same degree, though committed at different times, in the same indictment against the same offender, &c." But when we come to the instances given by Chitty, the counts joined are various statements of the same transaction.

The Commissioners on Criminal law, in their fifth report, submit an Article 57 (p. 64), as follows: "An indictment may contain several counts in respect of different offences; but the Court may, in its discretion, put the prosecutor to his election as to which of them he will proceed upon at the trial." This report was made in 1849, just after the passing of the 11 and 12 Vict. c. 66. In a note the Commissioners add: "It is the practice, however, of Judges, *which may be considered equivalent to a general law on the subject*, to limit a trial, where the indictment charges more felonies than one, to a single felony, allowing the prosecutor, where he is capable of electing, the right of electing for which of those charged he will proceed." The 11 and 12 Vict., c. 46, sect. 3, provides for adding a count for receiving to the count for larceny, or the reverse. "And whereas according to the *present practice* of courts of Criminal jurisdiction, it is not permitted in an indictment for stealing property to add a count for receiving the same property knowing it to have been stolen, or in an indictment for receiving stolen property knowing it to have been stolen, to add a count for stealing the same property, and justice is hereby often defeated: Be it enacted, in every

Regina vs. Abrahams.

indictment for feloniously stealing property it shall be lawful to add a count for feloniously receiving *the same property*," and *vice versa*. And "the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same, to find a verdict of guilty, either of stealing the property, or of receiving it knowing it to be stolen."

It is true the fiction of its being merely a practice, subject to the discretion of the Judge, is still kept up in the preamble to this section, and therefore it has been represented that the effect of this enactment was only to prevent the prosecutor being put to his election (see the note of the Commissioners on Cr. Law already quoted). Ingenious as this suggestion is, it is hardly satisfactory, for the section says "*it shall be lawful* to add a count for receiving *the same property*." It would seem, then, that before that time it was not lawful to put the two counts even for the same property. But if we turn to the Statutes which permit three embezzlements or three larcenies, committed within the space of six months, to be included in the same indictment, we see that no such argument can be drawn from their terms. They run thus: "It shall be lawful to charge in the indictment, and *proceed* against the offender for any distinct acts of embezzlement," &c., "*not exceeding three*," and so on. It is obvious that if the Legislature had thought that it was lawful to charge any number of distinct acts of embezzlement or larceny in one indictment, this enactment never would have been passed in such a form, and certainly would not have been persisted in. Somebody would likely have discovered that the enactment was a restriction, and not an extension of the prosecutor's power to indict. It is therefore manifestly incorrect, at all events since the first of these Acts—the 7 and 8 Geo. IV.—to say, without reservation of any kind, that any number of felonies may be charged in the same indictment, for no more than three embezzlements could be so charged, and now no more than three larcenies can be so charged, however the common law stood.

Why there should be any distinction between the great misdemeanours and felonies it is difficult to understand; but the law is so established conclusively by the case of Castro. Having said that it is lawful, I may as well add I do not think the practice a desirable one, and I have only spoken of the law as to felonies, in the fear that, from the very general terms in which the Lord Justice James had alluded to the subject, it might be supposed that the law permitted the indictment, trial and sentence of a person for two or more distinct felonies at the same time. As I understand the law, it stands thus:

(1) Generally any number of felonies may be charged in separate counts of one indictment.

(2) If it appears to the judge that these counts or any of them refer to more than one transaction, it is his duty to compel the prosecutor to elect on which charge he will proceed, except in the cases where by Statute two or three distinct felonies may be charged.

(3) That it would be unlawful to proceed on an indictment for embezzlement or larceny to try more than three distinct acts of embezzlement or larceny, and to take more than three verdicts and impose as many penalties.

(4) That in no other felony, except embezzlement or larceny, it would be

unlawful to try by one indictment more than one felony, resulting from different transactions, and to take more than one verdict and impose more than one sentence.

I am therefore against the defendant on the third point.

On the fourth point it appears that one of the tickets was a pass to an individual named and another. The other ticket was overdue on the face of it. It does not seem to me that this affects the case, so far as this Court is concerned. The accused was charged with obtaining two certain sums by false pretences. It was for the Jury to say whether the money had been obtained by false pretences. The pass and ticket were obviously not then good to carry Reddy and Heaton to Chicago, so we cannot say there was no evidence to go to the Jury. It is possible that under the facts, as stated, there was room for the Jury to have arrived at a conclusion favorable to the prisoner; but that is a point on which they are the judges, and, in my opinion, the best judges. I am therefore against the prisoner on the fourth point, and, consequently, I am of opinion the conviction should be maintained.

MONK and BABY, JJ., concurred.

The judgment is as follows:—

"After having heard counsel, &c.

"It is considered and adjudged and finally determined by the Court now here, pursuant to the Statute in that behalf, that an entry be made in the record to the effect that, in the opinion of the Court, the proceedings had and taken in the said Court at Montreal are regular; that the ruling of the Judge presiding in the said Court of Queen's Bench is correct, and that no reason hath been assigned by and on behalf of the said Levi Abrahams, sufficient to set aside the conviction on the indictment in this cause.

"It is therefore ordered that the said conviction be and the same is hereby affirmed, and that it do stand in full force and effect.

"(Sir A. A. Dorion, Chief Justice, and Mr. Justice Cross dissenting.)"

C. P. Davidson, Q. C., for the Crown.
Keller, for the defendant.
(J.K.)

Conviction affirmed.

SUPERIOR COURT, 1880.

MONTREAL, 31ST JANUARY, 1880.

Coram JOHNSON, J.

No. 1845.

Chauveau vs. *Evans es qual.*

Held:—That where the estate of the insolvent, comprising moveables and immoveables, is sold *en bloc*, the one per cent. for the building and jury fund is payable on the ascertained proceeds of the real-estate, and it is the duty of the assignee to retain this percentage out of the first payment on account of the price of sale.

JOHNSON, J. The sheriff brings this action against an official assignee, to get one per cent. upon $20,000, for which the real estate of an insolvent was sold

Chauveau vs. Evans es qual.

for the benefit of his creditors. The amount sued for is alleged to be due under sec. 145 of the Insolvent Act, and under the previous statutes creating a building and jury fund, and giving the sheriff a right of action in such cases. The defendant pleads the general issue, and also another plea setting up that time was given to the purchaser to pay, with the consent of the creditors, and that the assignee has not received the proceeds of the sale, which was a sale *en bloc* of the moveable and immoveable property, and such a sale is not within the meaning of the Act. As to the facts, there is an admission that the sale was a sale *en bloc* by the consent of creditors for $36,000, included in which was the real estate of the value of $20,000; that the terms of payment were deferred as pleaded; that the defendant has received the first payment, and out of it has declared a dividend, and retained nothing, and got nothing for the jury fund. Upon these facts I shall give judgment for the plaintiff.

1st. Whether it was a sale *en bloc* or not can make no difference if the price of the real estate be certain. 2nd. As to the deferred terms of payment, that could only and at the utmost give a mere temporary defence to the action *quant à présent*; and, 3rd. Whether the defendant has retained the money or not, he is liable just the same.

The language of the Act is: "one per centum upon all moneys proceeding from "the sale by an assignee, under the provisions of this Act, of any immoveable "property in the Province of Quebec, shall be retained by the assignee out of "such moneys, and shall by such assignee" be paid over to the Sheriff, etc., etc. The assignee admits he has violated his duty by not retaining the amount, as he was ordered to do by this statute, and as he certainly could have done out of the first payment.

There is no doubt that the section I have just cited referred to all sales by the assignee under the provisions of this statute; and with respect to sales *en bloc* special provision is made by section 38; and it is there provided "that no such sale shall *affect*, *diminish*, impair, or *postpone* the payment of any mortgage or privileged claim. The creditors have the power to order this mode of proceeding for the benefit of the estate; but that is surely no reason why the public should suffer. The plaintiff is entitled to recover one per cent. on the ascertained proceeds of the real estate; and, though the effect of deferred payments, if the fact warranted it, and if it was asked, might be a temporary suspension of the right of action, I must, as the case stands, give judgment for the amount demanded.

Robidoux, for the plaintiff.

Macmaster, Hall & Greenshields, for defendant.

(J. K.)

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OF THE

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COMPILED BY

STRACHAN BETHUNE, Q.C.

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" " " :—*Vide* HYPOTHEQUE.

" " " :—Where the estate of the insolvent, comprising moveables and immoveables, is sold *en bloc*, the one per cent. for the building and jury fund is payable on the ascertained proceeds of the real estate, and it is the duty of the assignee to retain this percentage out of the first payment on account of the price of sale. (Chauveau vs. Evans, S. C.) 347

INSURANCE:—Where the loss under a fire insurance of goods is made payable to a party other than the person who effects the insurance, and such third party becomes owner of the goods by a transfer to him of the warehouse receipts of such goods, such third party becomes thereby the party assured, and can, therefore, legally make all necessary preliminary proofs of loss. (Stanton, appellant, and The Home Insurance Co., respondent, Q. B.) 38

" :—In the above case the proof of loss was not satisfactorily established. (Do.) 38

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INSURANCE:—Where a fire policy, taken out by the owner of real property, declares that the loss, if any, is payable to certain persons named, "as mortgagees to the extent of their claims," such persons become thereby the parties assured to the extent of their interest as mortgagees, and their rights and interests cannot be destroyed or impaired by any act of the owner of the property. (Black et al., appellants, and The National Insurance Co., respondent, Q. B.) 65

" :—The preliminary proofs made in the above case were sufficient, and the respondent waived any right to complain of any delay in furnishing the same. (Do.) 65

" :—Where a note is taken for the premium, and the policy acknowledging the payment of the premium is delivered over, the non-payment of the note at maturity will not invalidate the insurance. (La Compagnie d'Assurance des Cultivateurs, appellant, and Grammon, respondent, Q. B.) 82

" :—*Vide* EXECUTOR.

" :—A mere threat to burn plaintiff's store, made during an election excitement, and several months prior to the insurance being effected, was not such a threat, the omission to disclose which at the time of effecting the insurance would amount to a concealment of a material fact. (Kelly vs. The Hochelaga Mutual Fire Ins. Co., C. of A.) 298

" :—The acceptance by an insurance company of the preliminary proofs of loss, after the expiration of the delay required by one of the conditions of the company's policies, and the statement by the company that it refused to acknowledge any claim on account of the undisclosed threat of incendiarism amounted to a legal waiver of the condition. (Do.) 298

INTEREST:—*Vide* ACTION EN REPETITION and PRACTICE.

" :—A clause in an obligation, to the effect that the payment of the capital shall be made at a fixed term, without interest until such term, or that the payment shall be made at such fixed term, on pain of damages, &c., is equivalent to a stipulation to pay interest from the expiration of such term. (Monchamp et al. vs. Perras, S. C.) 231

INVENTORY:—It does not follow that because some of the formalities have not been observed, that the inventory is not to be considered legal, if the person making it acted in good faith, and that these omitted formalities do not in any way affect the rights of the party complaining. (Archambault vs. The Citizens Ins. Co., and Archambault *mis en cause*, S. C.) 293

LEASE:—Where an *adjudicataire* of an immoveable, under the Insolvent Act of 1875, leased by the Insolvent for a fixed term, receives the rent payable under the lease from the tenant after the date of the adjudication, he thereby tacitly confirms the lease to the expiration of such term. (La Société de Construction Metropolitaine, appellant, and Les Commissaires d'Ecoles Catholiques de la Cité de Montréal, respondent, Q. B.) 25

" :—A cart voluntarily left in the possession of a tenant by a third party during several months is liable to seizure and sale by the landlord in payment of his rent, in the absence of proof that the landlord had reason to know that the tenant was not proprietor of the cart. (Beaudry vs. Lafleur, and Perry, opposant, C. of R.) 150

" :—When the proprietor of an immoveable hypothecated to a third party, leases it and receives the rent of it by anticipation for a period less than one year, the tenant is liable to refund so much of the rent as accrued after the lessor was put into insolvency, at the suit of the assignee, for the benefit of the hypothecary creditor. (Dupuy *et qual.* vs. McClanaghan, S. C.) 243

MARRIAGE:—In the R. C. church marriage is a spiritual and religious tie, and a sacrament over which the Superior Court has no jurisdiction. (Laramée et al. vs. Evans, S. C.) 235

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MARRIAGE:—Where two Roman Catholics have been married by a Protestant minister, the Superior Court has power to refer to the R. C. Bishop of the Diocese of the parties the decision of the question of the validity of the spiritual and religious tie of such marriage, before pronouncing upon the civil effects of the marriage. (Do.)..... 235

" :—The Superior Court is bound to recognize the sentence of the bishop on the question submitted to him. (Do.)..... 235

MARRIED WOMAN:—A, separated as to property from her husband, may fyle an opposition to a seizure of moveables, without the authorization of her husband. (Owens et al., vs. Lallamme, and Charest, opposant, C. C.)..... 207

" " :—A, may lawfully renounce, in favor of a creditor of her husband, not only her right to dower but to any hypothecary right she may have on his property, and may, therefore, lawfully grant priority of hypothec to such creditor. (Homier vs. Renaud, and Morin, opposant, S. C.)..... 253

MINOR:—*Vide* TUTOR.

" :—A minor cannot be relieved from a contract made by him during minority, unless he plead and prove *lésion*. (Gagnon vs. Sylva, C. of R.)..... 251

" :—An emancipated, can sue or defend an *action mobilière*, without the assistance of a curator. (Do.)..... 251

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MONTREAL (*City of*):—*Vide* ACTION EN REPETITION and PRACTICE.

" " " :—*Vide* ULTRA VIRES.

MORTGAGE:—*Vide* REGISTRATION.

" :— " DELEGATION of payment.

" :— " INSURANCE.

MUNICIPAL CODE:—*Vide* TAXES.

" " :—A judgment of the C. C. under Art. 100 of the Municipal Code is susceptible of Appeal to the Court of Q. B (Appeal side) (Rolfe et al., appellants, and The Corporation of the Township of Stoke, respondent, Q. B.)..... 213

" " :—A municipal valuation roll made by three valuators, of whom two were legally appointed, is null and void. (Do.)..... 213

MUNICIPAL CORPORATION:—*Vide* PROMISSORY NOTE.

POWER OF ATTORNEY:—*Vide* PROMISSORY NOTE.

PRACTICE:—The delay of 3 days after demand of plea, referred to in Art. 137 of the Code of C. P., is that of 3 *juridical* days. (Burroughs vs. Berthelot et al, S. C.)..... 23

" :—A defendant who has been foreclosed from pleading has no right to inscribe the case for *enquête exparte*. (Hughes vs Rees, S. C.)..... 41

" :—The effect of reconciliation between husband and wife is to extinguish an action *en séparation de corps* pending between them, and, consequently, the plaintiff's attorneys could not legally continue the proceedings to recover their own costs. (Gerard vs. Lemire dit Marsolais, and Gerard, plaintiff *en des.*, vs. St. Pierre et al., defendants *en des.*, C. of R.)..... 42

" :—*Vide* AVEU JUDICIAIRE.

" :— " SHERIFF'S SALE.

" :— " ACTION EN REINTEGRANDE.

" :— " " EN GARANTIE.

" :— " " EN DESTITUTION.

" :—After the *enquête* has been closed, and the case finally heard on the merits, the case has ceased to be on the *rôle d'enquête*, and consequently, the granting of a motion to discharge the *délibéré* and allowing the plaintiffs to re-open their *enquête*, necessitates the re-inscription of the case on the *rôle d'enquête* before the plaintiffs can proceed to the examination of their witnesses. (Devine *et vir* et al. vs. Griffin, S. C.)..... 84

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" :— " VENUE.

" :—A judicial sequestrator may be appointed by a Judge in Chambers. (Heritable Securities and Mortgage Investment Association (limited) vs. Ravine, C. of R.)..... 107

" :—*Vide* PRIVILEGE.

" :— *Vide* EVIDENCE.

" :—The date of actual return of an action as established by the paraph of the Prothonotary and the Register of the Court, cannot be contradicted by affidavits. (Ross, appellant, and Marceau, respondent, Q. B.)..... 143

" :—*Vide* DISTRACTION DE FRAIS.

" :—When a defendant neglects to fyle the original plea of which a copy has been served on the opposite party, and the case proceeds to final hearing, as in a contested case, the plaintiff's attorney may fyle the copy of plea served on him, and stamp it, to take the place of the original plea, without notice to the defendant's attorney, or leave or permission of the Court. (Fontaine, appellant, and The Montreal Loan and Mortgage Co., respondent, Q. B.)..... 160

" :—When the account asked for by an action *en reddition de compte* is fyled in the case, and the plaintiffs neglect to contest it within fifteen days thereafter, the plaintiffs are held to have admitted the correctness of such accounts. (Hart et al., appellants, and Hart, respondent, Q. B.)..... 161

" :—*Vide* TUTOR.

" :—The designation of a party in the writ of execution as universal usufructuary legatee, instead of donee, as stated in the judgment, is no cause of nullity of the seizure made of the defendant's personal effects. (Trudelle, appellant, and Hudon et al., respondents, Q. B.)..... 171

" :—*Vide* BAILIFF.

" :— " SAISIE ARRET.

" :— " ACTION HYPOTHECAIRE.

" :—Where parties intervene in the case of a *saisie arrêt simple*, and claim to be proprietors of the things seized, and instead of contesting plaintiff's claim, give security that the goods shall be forthcoming to abide the future judgment of the Court, and thus get possession of the things seized, and suffer the plaintiff to take a judgment in the case, declaring the seizure good and valid, such parties cannot oppose the sale of the things seized in execution of said judgment, on the ground that they are the proprietors thereof. (Prevost, appellant, and Rodgers et al., respondents, Q. B.)..... 170

" :—It is competent to a Judge in Chambers to prolong the delay of 8 days provided by Art. 131 of the Code of C. P. until after the *exception dilatoire* shall be judged. (Mailloux vs. Trudeau, S. C.)..... 189

" :—CAUSE OF ACTION.

" :—Where no delay is fixed by the contract for the performance of an alternative obligation, the debtor can only be deprived of his option by the expiration of a delay fixed by a judgment against him; and, therefore, where the amount of a municipal corporation's subscription to a railway company was payable either in debentures of money, the Corporation could not, by a mere notarial protêt served on it fixing a time for the delivery of the debentures, be deprived of its option to pay in debentures, and the action against the Corporation should have given the alternative. (La Compagnie du Chemin de Fer des Laurentides, appellant, and La Corporation de la Paroisse de St. Lin, respondent, Q. B.)..... 191

" :—*Vide* COURT OF REVIEW.

" :— " MARRIED WOMAN.

" :— " SALE.

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PRACTICE :—In an action *en répétition*, interest cannot be recovered from the date of payment, unless the party receiving the money was in bad faith, and, therefore, the Corporation of Montreal receiving money paid to them under threat of execution, not in bad faith, cannot be compelled to pay back money erroneously exacted, with interest from any earlier date than the service of the action *en répétition*. (Wilson et al., appellants, and The City of Montreal, respondents, Q. B.)..... 227

" :—*Vide* STAMPS.

" :—CAPIAS AD RESPONDENDUM.

" :—When a party has been allowed to sue *in formâ pauperis*, it is not competent for the defendant to move that all the proceedings in the cause be declared null, for want of legal stamps, on the ground that the order so to sue had been obtained by fraud. (Guillaume vs. The City of Montreal, S. C.)..... 258

" :—The Superior Court has a discretionary power, under the Q.S., 41 Vic. ch. 14, to issue a writ of injunction to the City of Montreal, ordering the city to suspend proceedings before the Recorder's Court, for the enforcement of an alleged illegal by-law, and this, even when the question of the validity of the by-law is pending before the Court of Appeal, but such discretion will only be exercised in the case of irreparable injury, especially if the injunction will cause serious injury to the city; and the condemnation to a fine subject to imprisonment in default of payment does not constitute such a case of irreparable injury. (Mallette vs. The City of Montreal, S. C.)..... 264

" :—In the case of a *saisie arrêt* of monies due to a defendant, sued as a universal usufructuary legatee, but condemned as such personally to pay the plaintiff's debt, the *tiers saisi* cannot refuse to declare what he owes the defendant personally as well as in her quality of usufructuary legatee. (Hudon et al., appellants, and Rivard, respondent, Q. B.)..... 268

" :—A judge is bound to revise at the final hearing a decision maintaining an objection made by a *tiers saisi* to answer a question submitted to him. (Do.)..... 268

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" :— " FALSE PRETENCES.

" :— " INDICTMENT.

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" :—Interruption of (in a case above $50) cannot be proved by oral testimony. (Pinsonneault et al., appellants, and Desjardins, respondent, Q. B.)..... 100

PRIVILEGE :—In accordance with a usage of trade at Montreal, appellants borrowed from Brown, McMinn & Co. a quantity of corn, depositing a sum of money as security for its return. Two or three days before the insolvency of the latter, appellants returned the corn, but neglected to exact the re-payment to them of the money deposit. The corn was immediately afterwards sold by Brown, McMinn & Co., and the proceeds of the sale subsequently collected by the assignee of their estate appointed under The Insolvent Act of 1869. Held:—That the appellants had no lien or privilege on these proceeds for the amount of said unreturned money deposit. (Borrowman et al., appellants, and Angus et al., respondents, Q. B.)..... 1

" :—Where the proceeds of sale of an immoveable by the sheriff are insufficient to pay the claims in full of two rival claimants, having the same kind of privilege (namely, the one for arrears of *cens et rentes* accrued prior to the death of the *grevé de substitution*, and the other for arrears of *cens et rentes* accrued since), the proceeds shall be divided *pro ratâ* between

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" :—The costs incurred by a plaintiff to get rid of a *tiers opposition* filed to a *saisie immobilière* are privileged, and should be collocated as such on the proceeds of the sale of the property. (Vaillancourt vs. Collette, and Perrault, opposant, and Beaubien, Cr. collocated, and Nantel, contestant, S. C.)..... 302

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" " :—A signed by several persons, trustees of an insolvent estate under a deed of composition which gave them no power to draw or accept bills, as "trustees to Estate C. D. Edwards," can be recovered from such persons personally and jointly and severally. (Archibald et al., appellants, and Brown et al., respondents, Q. B.)..... 85

" " :—A, signed by the Mayor and Secretary-Treasurer of a Municipal Corporation, in the name of the Corporation, is binding on the Corporation, when it is neither alleged nor proved that the note was given without lawful consideration. (The Corporation of the Township of Grantham, appellant, and Couture et al., respondents, Q. B.)..... 105

" " :—A, granted by a Building Society as collateral security for the repayment of a deposit made with it, although payable to order, is not a negotiable instrument, and, therefore, security cannot be exacted therefor as for a lost negotiable instrument under Art. 2316 of the Civil Code. (Cooley *es qual.*, appellant, and The Dominion Building Society, respondent, Q. B.)..... 111

" " :—When a vendor of a lot takes, in payment of the purchase money, the promissory note of a third party, unendorsed or otherwise guaranteed by the purchaser in writing, but which the purchaser (knowing the same to be worthless) represents to the vendor to be "as good as gold," and which proves to be really worthless in consequence of the insolvency of the maker thereto, the vendor may tender the note back and sue simply for the purchase-money, without demanding the rescision of the sale. (Miller vs. Baudelin, C. of R.)..... 208

" " :—*Vide* BUILDING SOCIETY.

" " :— " STAMPS.

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" " :— " SHERIFF'S SALE.

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" " " :—The arbitrators have no right to order the making of certain works, or to condemn the expropriating to perform such works. (Do.)..... 193

" " " :—The respondents could not dissolve their Corporation without the authority of the Dominion Parliament. (Do.)..... 193

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REGISTRATION:—A mortgagee on immoveable property who has registered his mortgage, and at the same time registered by memorial the title deed of the mortgagor (making no mention therein of any charges in such title deed), has priority of hypothec over the claim of the *bailleur de fonds* contained in such title deed, and which claim was only registered afterwards (and more than two months after the execution of the title deed) by registering the title deed at full length. (Charlebois, appellant, and La Société de Construction Metropolitaine, respondent, Q. B.)..... 20

" :—Where a mortgagee has neglected to re-register against the cadastral number within the prescribed delay, he loses his priority of rank as against a subsequent mortgagee whose mortgage has been duly registered, and in which mention is made of the prior mortgage. (*Re* Jeannot, Ins., and La Compagnie de Prêt et Crédit Foncier, claimant, and Pope et al., contestants, S. C.)..... 23

" :—*Vide* HYPOTHEQUE.

" :—Notwithstanding the pendency of a hypothecary action, the alienation of the immoveable by the holder against whom the action is brought has full force and effect against the creditor bringing such action, if the creditor's claim be one the registration of which had to be renewed under the cadastral system, and the renewal had not been duly effected before the purchaser registered his title. And in this connection, art. 2074 of the Civil Code must be interpreted by ch. 47 of the Cons. Stat. of L. C., on which it is founded. (Thayer vs. Ansell, and Moss et al., opposants, C. of R.)... 181

RESERVED CASE:—When no application has been made for a new trial, and the question whether there should be a new trial has not been reserved, the Court sitting in Appeal and Error will not make an order for a new trial, when the verdict of the jury is quashed. (Regina vs. Hincks, Q. B.)..... 116

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" " :—*Vide* PRACTICE.

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" :—Where a, is payable in bonds to be taken at 50 per cent. of their nominal value, a tender of these bonds, equal to $1500 par value, is not a legal tender of the sum of $619.50, or $1239 in debentures, if the party tendering attaches the condition that the difference of $261 shall be returned to him in money. (Legge, jr., appellant, and The Laurentian Railway Company, respondent, Q. B.)..... 68

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" :—*Vide* CAUSE OF ACTION.

" :—The value of a deficiency of quantity in land sold is properly recoverable in the shape of damages, and the diminution of price allowed in such a case by article 1501 of the Civil Code is only a mode of assessing such damages. (Doutney, appellant, and Bruyère et al, respondents, Q. B.).. 17

" :—Where the faculty is accorded to the purchaser in a deed of sale of immoveables to relieve any one of the lots described in the deed of the whole balance of purchase money (made payable by the deed with seven per cent. interest) by paying to the vendor at the rate of sixteen cents per foot of the lot to be discharged; the interest at the rate aforesaid must also be paid in addition to the capital at said rate of sixteen cents per foot. Chaussé vs. Larose, and Symes, Cr. collocated, and Dupré et al., contestants, C. of R.)..... 127

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" :—In the case of a, of moveables *in fraudem creditorum*, it is not necessary to bring a revocatory action to have the same declared null, but an interested creditor can raise the question of nullity in any description of

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SCHOOL TAXES:—A suit for the recovery thereof cannot be brought in the Superior Court. (The Corporation of the Township of Acton vs. Felton et al., C. of R.)..... 113

" " :—In a suit between rate payers and school commissioners, the fact that rate payers are dissentients, and the organization of a corporation of dissentient school trustees, may be proved by verbal testimony, where it is evident by receipts for school taxes granted by such dissentient corporation in favor of said rate payers, during a series of years, and by other circumstances, that such a corporation has existed *de facto* and claimed payment of school taxes in that capacity during many years. (The School Commissioners of the Municipality of the Township of Roxton, appellants, and Boston et al., respondents, Q. B.)..... 123

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STREET RAILWAY:—The right accorded by the legislature "to use and occupy any and such parts of any of the streets or highways" as may be required for the purpose of a street railway track, &c., must be exercised *ex æquo et bono*, in accordance with the use and destination of the highway, and, therefore, the placing of the track on the part of the highway used as a footpath is illegal, and will be prohibited by the Courts. (Ross, Atty. Gen., appellant, and The Montreal City Passenger Railway Co., respondent, Q. B.)..... 60

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" :—The right accorded by Art. 630 of the C. C. to the ascendant to resume the property given to a descendant is one of succession or inheritance, and consequently such property may be seized by a creditor of the deceased descendant, on a judgment recovered by the creditor against the ascendant as the beneficiary heir of the descendant. (Corse vs Drummond, and Drummond, opposant, S. C.)..... 254

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" :—The arrears of such taxes due by a deceased person are properly recoverable from the universal legatee. (Do.)..... 113

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" " :—An Act of the Provincial Legislature, authorizing the City of Montreal to make a By-Law imposing a license tax on butchers keeping stalls or shops for the sale of meat, fish, &c., within the city, elsewhere than on the public markets, is not *ultra vires* of the Legislature. (Angers, Attorney-General, vs. The City of Montreal, S. C.)..... 259

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" " :—A party condemned, as universal usufructuary legatee or donee, is, in virtue of such judgment, the personal debtor of the condemnation money. (Trudelle, appellant, and Hudon et al., respondents, Q. B.)..... 171

(Also Hudon et al., appellants, and Rivard, respondent, Q. B.)..... 268

" " :—*Vide* PRACTICE.

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